

No. 14695

United States
Court of Appeals
for the Ninth Circuit

MID-STATES INSURANCE COMPANY, a corporation, and THE ANGLO CALIFORNIA NATIONAL BANK OF SAN FRANCISCO,
Appellants,

vs.

AMERICAN FIDELITY AND CASUALTY COMPANY, INC., a corporation, AMERICAN PLAN CORPORATION, a corporation, MARK HART, JOSEPH LOTZ, RALPH L. SMEAD and L. SUDEKUM,

Appellees.

Transcript of Record

In Three Volumes

VOLUME II.

(Pages 401 to 820, inclusive.)

Appeal from the United States District Court for the Northern District of California, Southern Division

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(Testimony of Gerald A. Hatfield.)

Q. Mr. Bronson asked you about the average commission of twenty-seven per cent that Mr. Lotz paid, asked if you knew that was the commission he was paying to his sub-agents. Let me ask you, Mr. Hatfield, is that question of the commission that a general agent pays to his sub-agent a matter within the control of the company?

A. No, not under our control.

Q. Just describe the position of a sub-agent in relation to the company in that respect.

A. The sub-agent has no direct relation with the company, his dealings are all direct with the general agent.

Q. Well, tell me about the relationship of the general agent and the company.

A. Well, under the retrospective agreement the general agent is free to offer rates of commission to sub-agents that he feels he needs to offer in order to get the business.

Q. How would you describe the general agent in relation to the company, what would be the description you might give? [262] Is he an independent contractor insofar as—— A. Yes.

Q. ——commission is concerned?

A. Yes, sir.

Q. And what interest does the company have in the commission the general agent pays?

A. We have no interest.

Mr. Bronson: The witness agreed with you for us that the general agent is an independent contractor?

(Testimony of Gerald A. Hatfield.)

Mr. Garrison: Insofar as the establishment—

Mr. Bronson: I didn't understand the question that way. We thought it was their contention it was a trust relationship.

Mr. Garrison: Well, it is.

The Court: The testimony has to do with his agents, is that it?

Mr. Garrison: Yes, insofar as the establishment of the rate of commission with his sub-agents, that is the matter that the company has no influence, control or right to interest itself in.

Mr. Bronson: May I have the question?

(Question read by the Reporter.)

Mr. Garrison: Does that satisfy you, Mr. Bronson?

Mr. Bronson: Just wanted to hear it read. I am always satisfied when I get an answer I asked for.

Mr. Garrison: Q. I am talking about, of course, the [263] right of the general agent to establish the commission of his sub-agents.

A. That is correct.

Q. That is a matter that he decides in his own good judgment operating his own business?

A. That's correct.

Q. Then the question was asked you by Mr. Bronson regarding whether or not you knew that Mr. Lotz was paying thirty per cent commission, and he read from your testimony in the previous trial that you did know he was paying thirty per cent commission, and then we read on a little more and found that had reference to trailer homes. Will

(Testimony of Gerald A. Hatfield.)

you tell the Court what you meant when you said trailer homes and how that enters into the amount of commission.

A. Well, trailer homes—I am sure you have seen these long trailers that people live in and tow behind their automobiles, anywhere from fifteen to forty feet long. Actually they are mobile homes, is what they are, and we have, Mid-States, as well as some of the other companies, have specialized in writing insurance on mobile homes. Writing insurance on mobile homes is an altogether different type of risk than automobile risk, because you're actually writing on a movable dwelling. We have had now insurance on mobile homes for a period of ten or more years, and every year we are always having a phenomenal loss experience. Our loss ratio on [264] mobile homes has never exceeded thirty-five per cent.

Now, when I was referring to thirty per cent commission which I had heard that he had offered to an agent, he had offered that business on mobile home writings exclusively, and he could very well and very profitably pay thirty per cent commission for that type of business. But also in that letter I told him he was unwise to offer thirty per cent and I didn't think it was necessary for him to do it.

Q. Competitively, you mean?

A. Yes. The thirty per cent commission had nothing to do with his automobile business.

Q. What was your interest in the subject of his payment of any commission?

(Testimony of Gerald A. Hatfield.)

A. Well, the reason it came to my attention was that he had contacted a sub-agent of our general agent in Los Angeles. In other words, he had contacted our other agent's business and had offered this sub-agent a higher rate of commission than our Los Angeles agent was paying, so that caused me to be on the hot seat with our Los Angeles agent.

Q. In other words, that was not a control of Mr. Lotz' commissions as such, but keeping peace in the family?

A. That's correct. [265]

Q. Mr. Bronson called your attention to page 30, your testimony in the other trial. It is a statement—a question and answer appearing on line 21 where you were asked:

“Question: What is the fact?

“Answer: The true fact is, after checking my records, he actually owed Mid-States \$62,000 at that time.”

You were referring to the month of August 1951. You remember that?

A. Yes.

Q. Can you tell us whether that account was late or delayed, or whether it was current, paid up?

A. Month of August account?

Q. Yes. A. Yes.

Mr. Bronson: I would like to know what the word “current” means now. That is a new meaning applied by the witness; that is past due, but it is current.

Mr. Garrison: Q. Well, just tell us the condition.

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: Couldn't you answer what month it was a settlement for?

Mr. Garrison: Q. Do you recall the facts regarding the month of August in Mr. Lotz' account whether or not at the time you testified at the trial you were referring to payment of the account by Mr. Lotz that was overdue or whether it was within [266] his contract period?

A. It was my recollection the August account was paid on time.

Q. So that when you referred to the amount as \$62,000 in your testimony at that trial, you weren't talking about any account that was late?

A. No, no.

Q. When you were in Mr. Mead's office in respect to this statement that Mr. Smead prepared on the 5th of December, Mr. Bronson asked you whether or not Mr. Mead had reproached you regarding anything in connection with the taking of the statement, and you said no.

A. That is correct.

Q. It is a fact, is it not, that as appears on the statement Mr. Mead acknowledged the execution of the document as a notary?

A. That's correct.

Q. Did he do that in your presence on that occasion? A. He did.

Q. And did he express any question regarding the statement at all? A. No, sir.

Q. And at that time he was representing Mr. Lotz? A. Yes, sir.

(Testimony of Gerald A. Hatfield.)

Q. And Mr. Lotz likewise signed the document?

A. He did.

Q. And in Mr. Mead's presence? [267]

A. Yes, sir.

Q. Was there any altercation between lawyer and client as to whether he should or shouldn't sign it? A. Absolutely none.

Q. Were there some changes made in the statement by either Lotz or Smead at the time of this meeting?

A. Yes, there were a few changes made.

Q. Mr. Mead presiding over the changes?

A. Yes, sir.

Q. Mr.—counsel for Mr. Lotz asked you a moment ago regarding commingling, and he did not distinguish between whose funds were being commingled. May I ask you, Mr. Hatfield, whether or not, if there is commingling in respect to funds of certain principals in the insurance business, it is permissible?

A. You mean the funds of various insurance companies being grouped into one account?

Q. Certainly. A. Yes, it is.

Q. In other words, under the common practice in insurance a trustee account—just describe how an agent is required and commonly keeps trusted funds?

A. Well, an agent is required to keep a trustee account into which he is to pay the premium monies due his company. He is not required to keep a separate trust account for every company which he

(Testimony of Gerald A. Hatfield.)

represents. Some agents represent as many as sixty [268] companies. That would be a burdensome thing to do.

Q. How about his own funds?

A. You mean his own personal funds?

Q. His own personal funds.

A. He is supposed to keep those separate and not co-mingle with the company's funds.

Q. But when you had reference to commingling you had reference to which funds?

A. Reference to his personal funds.

Q. So far as this case is concerned, is there any criticism of the maintaining in one account the funds of American Fidelity and Mid-States Insurance Company as far as you are concerned?

A. No, sir.

Q. And the gentleman asked you your opinion regarding Mr. Lotz and you expressed an opinion. Will you tell us whether or not you had reference to any particular period of time you gave that answer?

A. Well, he threw that question at me pretty fast. At the time we had been talking about before November of '51, and of course, before November of '51 I had no question of Mr. Lotz' integrity or his honesty. But since this thing has come to light I have a great deal of question about it.

Q. And that has to do with the contract that Mr. Lotz had with you?

A. Has to do with the fact that he did not live

(Testimony of Gerald A. Hatfield.)

within his [269] contract, and also he concealed many things that were vital to me.

Q. And Mr. Hatfield, does the contract contain provisions respecting duties of the agent?

A. You mean as respects——

Q. Handling of funds?

A. Yes, sir. I think the contract states definitely he shall place them in a trustee account.

Mr. McKinnon: Which contract are you referring to?

Mr. Garrison: The contract that was in force in 1951.

Mr. McKinnon: Referring to the——

Mr. Garrison: Executed on September 1, 1951, plaintiff's Exhibit 2.

I would like to read, if the Court please, for the record, paragraph 4 of that contract.

“The Agent shall, unless specifically otherwise directed in writing, collect all premiums on business written for the company and transmit such premiums to the Company within 60 days after the end of the month in which the business was written. All premiums received by the agent shall be held by such agent as trustee for the company. The privilege of taking commissions provided in paragraph ‘9’ of this agreement from premiums received by such Agent shall not be construed as changing the [270] relationship of the respective parties hereto or of the fact that the premiums received are trust funds. The keeping of an account with an Agent on the Company's books, as a creditor and debtor

(Testimony of Gerald A. Hatfield.)

account, is declared a record memorandum of business transacted, and either such keeping of account nor alteration in compensation rate, nor failure to enforce prompt remittance for compromise or settlement or declaration of balance of account, shall be held to waive the understanding that the premiums collected by the agent are trust funds or change the character of such premiums. The Company shall render to the Agent monthly, not later than the 25th day of the month following that in which the business is written, an account of money due the Company on the business placed by the Agent, and the balance therein shown to be due the Company shall be paid by the Agent."

Q. Now, did Mr. Lotz do those things in the year 1951? A. Yes, sir.

Q. You mean insofar as Mid-States is concerned did he——

Mr. Bronson: Wait a minute. That calls for his conclusion; it is too broad, did he do those things. You can't ask the question that way, read a portion of the agreement and then—— [271]

Mr. Garrison: Q. Did Mr. Lotz violate his contract in provision 4 I just read?

Mr. Bronson: That calls for the conclusion of the witness. He can state facts.

The Court: Answer that by developing the facts.

Mr. Bronson: That is all.

Mr. Garrison: I have a brief re-cross examination.

The Court: Well, it is time for tea now.

(Whereupon an adjournment was taken until 2:00 p.m. this date.) [272]

The Court: Don't pay any attention to the Grand Jury. Go right ahead with your work. Go right along with the case. You never can tell when the Grand Jury is going to come. Don't let that bother you at all.

Mr. Garrison: I have one or two matters that I would like to complete, if I may, as part——

If you will take the stand.

GERALD A. HATFIELD

resumed the stand.

Redirect Examination—(Continued)

Mr. Garrison: Your Honor please, the last three questions that were asked before the adjournment, there were objections to the last two which were, I take it, sustained. The third question before was on the same subject but there was no objection to it, and I assume that the objection runs to all the questions on that subject and the ruling would be the same, so that the answer would not——

The Court: You can't anticipate me. You better protect the record.

Mr. Garrison: Thank you. Would you read the third question back, Mr. Reporter?

(Record read.)

Mr. Garrison: I would like to withdraw the question and [273] ask the answer be stricken, if the Court please.

The Court: No objection?

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: No objection.

Mr. Garrison: Thank you.

The Court: It may go out.

(Whereupon other matters were considered by the Court.)

The Court: Proceed, gentlemen.

Mr. Garrison: Thank you.

Q. Mr. Hatfield, Mr. Bronson asked you this morning some questions in respect to Defendant's Exhibit G, which is a letter addressed to you dated June 6, 1951. Ask if you would look at that letter and call your attention to the reference in the letter to the term "trouble". Would you read that sentence, please?

A. "Again, I must say if we can't get better representation in California than Joe Lotz we will never stay out of trouble."

Q. And had you been having some trouble with Mr. Lotz at that time?

Mr. Bronson: We will object to that if it is an attempt to vary the thing. The letter wasn't written to him—by him.

The Court: Read the question.

Mr. Bronson: Objected to as calling for a conclusion of the witness. He asked him to read the letter and the witness [274] started to give an explanation. Then he asked him if—had he been having trouble with Mr. Lotz. I must object to any statement by the witness attempting to translate the meaning of the sender of the letter, Mr. Titus.

(Testimony of Gerald A. Hatfield.)

The Court: I asked the reporter to read the question.

Mr. Bronson: I am sorry.

(Record read.)

The Court: Read that letter again.

The Witness: "Again, I must say if we can't get better representation in California than Joe Lotz, we will never stay out of trouble."

The Court: Did you write that letter?

The Witness: No, I didn't write it.

The Court: Who did?

The Witness: Mr. Titus.

The Court: Objection will be sustained.

Mr. Garrison: Very well, Your Honor. Mr. Titus is here.

Q. And I asked you this morning, Mr. Hatfield, regarding certain loss ratios in the first part of 1951, which you gave us, and you said you did not have the loss ratios for the later months.

A. That's correct.

Q. Have you since computed those?

A. Yes, sir.

Q. And will you give us the loss ratios on the business that [275] Mr. Lotz placed in your company for the months subsequent to August in 1951?

A. Yes, sir. In September 1951 it was 121.6; in October 1951, 48.3; November 1951, 104.8; December 1951, 118.7; and the loss ratio for the complete four months is 92.6.

Q. What was the loss ratio for the year?

A. 71, I think it was in the record, wasn't it?

(Testimony of Gerald A. Hatfield.)

Q. You gave us the loss ratio for 1952. Would you give that again, please?

A. 1952 is 36, I believe it was.

Q. And when did you cancel the business that had been placed in your company with Mr. Lotz that he received from the Public Service Insurance Company and the American Fidelity and Casualty Company?

A. Well, the great bulk of the cancellations were effected in the latter part of—end of December and first part of January 1952.

Q. And the change in the loss ratio reflects those cancellations, does it? A. Very definitely.

Q. And the increase in the loss ratio in the latter months reflects that business, does it not?

A. Very indicative of the fact that the business we put on the last four months was highly sub-standard.

Q. That is the business you cancelled? [276]

A. That is correct.

Mr. Garrison: Cross examination.

Mr. Bronson: Am I going ahead——

Mr. McCallum: I have no questions, thank you.

Recross Examination

Mr. Bronson: Q. Now, your attention was called to an exhibit that is in evidence there, that is the September 1, 1951 contract, new contract, that you made with Joe Lotz. A. Yes, sir.

Q. You have that in mind. Can you recall that Mr. Garrison read to you article 4 of the agree-

(Testimony of Gerald A. Hatfield.)

ment? I have a photostat of it, the one on the first page here that has some reference to trust funds. You recall that reading, do you? A. Yes.

Q. All right. Now, it is true, isn't it, that that was the first contract you had with Joe Lotz, whether it was by formal printed contract or by letter, such as your agreement, the changes in the agreement that were made in May of 1951, that has any reference to trusteeing the funds that he collected as premiums? A. Yes, that's true.

Q. And that agreement, whatever its exhibit number is, the new agreement that you made September 1, 1951, was after the date of the cancellation of the American Fidelity and Casualty [277] Agency contract with Joe Lotz?

A. That is what I understand, yes, sir.

Q. Yes. Now, this is a form, I am using my copy rather than hunting for the other one, unless you can find it, I think it is either agreement one or two. I want to call your attention to this. It is a document that is on your—is printed and on your own stationery with your own name at the top.

Mr. Garrison: Which exhibit are you referring to?

Mr. Bronson: This is Exhibit 1 or 2, it is the September 1, 1951 agency.

Q. That was prepared by the counsel for the company?

A. I presume it was; I don't recall definitely.

Q. I want to read you a portion of the provisions of paragraph 4, not all of the sentences, that

(Testimony of Gerald A. Hatfield.)

starts there on the sixth line, Mr. Garrison. I will read it now.

“The keeping of an account with the Agent on the Company’s books, as a creditor and debtor account, is declared a record memorandum of business transacted, and neither such keeping of account, nor alteration in compensation rate, nor failure to enforce prompt remittance or compromise or settlement or declaration of balance of account, shall be held to waive the understanding that the premiums collected by the Agent are trust funds or change the character of such premiums.” [278]

Now, it is significant that you omitted to declare in that provision as circumstances that would not alter the trust character of the funds in the hands of the agent the payment by him of commissions to sub-agents, or the use of funds for the operation of his own business, and I ask you if that was not purposely omitted in the long history that your company has had in agency relationships?

A. I cannot say it was purposely omitted, no.

Q. With regard to this matter that elicited an objection, or an interruption by me this morning on the subject of independent contractor, that is the designation of that type of legal relationship as describing the relations in your mind that you had with Joe Lotz during this—. I want to read into the record, if the Court please, the short portion of the testimony from the trial of the bank case.

Mr. Garrison: If the Court please, we will object to the reading of any record of any previous

(Testimony of Gerald A. Hatfield.)

case in this case unless it is for the purpose of impeaching some witness.

Mr. Bronson: It is an impeachment.

Mr. Garrison: Let us ask the witness to read the record and then ask him if he were asked the question and gave the answer.

Mr. Bronson: I got to get formal now.

Mr. Garrison: No, but I don't think we ought to read wholesale from one transcript into this.

Mr. Bronson: That is all right; I thought we would go ahead as before.

Mr. Garrison: What portion are you referring to?

Mr. Bronson: It is marked there, it is the last half of the page.

Mr. Garrison: What page?

Mr. Bronson: Page 121.

(Witness reading transcript.)

A. Yes, sir. Isn't that the same thing I said this morning?

Mr. Bronson: The questions are supposed to go the other way. I won't attempt to answer that, I will just read it, let the Judge make his decision whether it is the same thing.

Line 13:

"Question: Now, you didn't, of course, ever make any audit of Mr. Lotz' books prior to going there and finding this condition, did you?

"Answer: No, sir.

"Question: The company doesn't do that as a matter of practice?

(Testimony of Gerald A. Hatfield.)

“Answer: That is right.

“Question: The agent is an independent contractor, keeps his own books and his own bank account?”

“Answer: That’s correct.”

Mr. Garrison: Would you read the next question also? [280]

Mr. Bronson: I am not asking the witness here, Your Honor, if—. Yes, I will read further if you wish, but I am not asking the witness if he so testified, because this is really the same case as we have here, only the trial of the bank.

The next question is:

“Question: And of course, you had no occasion to give any notification to the Anglo Bank at any time regarding Mr. Lotz or any other bank?”

“Answer: No, sir.”

Shall I go further?

Mr. Garrison: No, that’s fine.

Mr. Bronson: All right.

Q. Now, then, with reference to the figures you supplied us this morning, January to August loss ratios, in the first place the term “loss ratio”, when it expresses percentage, means percentage of the gross premium, does it not?

A. No, it means the per cent of loss, the ratio of loss to earned premiums; ratio of loss to earned premiums.

Q. Well, the earned premiums means gross premium amount; you don’t take any reduced amount?

A. Oh, no, that’s correct.

Q. In other words, you don’t take out your fif-

(Testimony of Gerald A. Hatfield.)

teen per cent retention, or your twenty per cent retention before figuring your loss ratio; it is taken on the full number of dollars that came in as premium, right? [281] A. Right.

Q. All right. Now, you say that you cast up these figures. As a matter of fact, they are available to you—for instance, in the month of January the loss ratio figures are available to you on or before the 15th of the following month, is that not true?

A. That is about right, yes.

Q. So that in January when Mr. Lotz showed a 66.8 loss ratio, that means that \$66 out of a \$100 of premium were actually paid out to policyholders on losses sustained for that period, right?

A. Right.

Q. Now, at that time you were taking out how much of the premium dollar for your retention?

A. In January of 1951?

Q. Yes. A. Fifteen per cent.

Q. On top of that—that would be eighty per cent of the premium dollar?

A. That's correct.

Q. That would be twenty per cent available to Joe Lotz for the various things we have talked about here that are a matter of his own settlement?

A. That is true.

Q. As costs of running his business, his cost of servicing [282] claims, his cost of paying for the acquisition of business from the sub-agent?

A. That's correct.

Q. Now, when you got down to April the loss

(Testimony of Gerald A. Hatfield.)

ratio figures there, which you say were available to you on or before May 15, was 112.4 per cent of the business for April; right? A. Right.

Q. So you knew he lost money that month if it didn't cost him a nickel to get his business, if it didn't cost him a nickel to service his claims, if it didn't cost him a nickel to run his business and acquire business from sub-agents; right?

A. That's correct.

Q. So he went behind. Now, in May you had 83.7, and you took out—that was available to you the middle of June, and you took out at that time fourteen or fifteen per cent?

A. Fourteen in May.

Q. Fourteen per cent. That would be 97 per cent. Of course, you knew an agency couldn't run on a 97 per cent take out of the business, didn't you?

A. Well, certainly I knew that. But I don't get excited over one month's loss ratio; no insurance company does, neither does your agent. How about that low month where he made a lot of money?

Q. Let us go on to June. I am talking about this time when you didn't know anything about the financial—let's take [283] June. This is in 1951. He had 75.4 per cent. And you knew when you had your 15 per cent to take that he couldn't run on the remaining 90 per cent out of the dollar, didn't you? A. On the remaining 90 cents?

Q. Yes, with a 75 per cent loss ratio, and you took 15 per cent for your retention, that leaves 90

(Testimony of Gerald A. Hatfield.)

cents. That makes 90, and leaves 10 cents on a dollar. A. Leaves ten.

Q. Can't run on that, can he?

A. No, he can't. He can for one month and pick it up the next month.

Q. The history of your dunning of this man and your insistence on his paying, and your statement that he was in trouble, and those things, don't those factors import that you knew that Joe Lotz couldn't any more run one month and go behind without help?

A. No, I don't agree with that statement.

Q. In May when you gave him 75 days instead of 25 days, isn't it a fact that you had to do that to let the fellow keep open and let him use that money for his own purposes——

A. That isn't——

Q. ——for a longer period than 25 days? You say that isn't true?

A. That is right, that isn't the reason I gave it to him.

Mr. Garrison: Just let him finish his answer, Mr. Bronson. [284]

Mr. Bronson: I am sorry.

The Witness: I have finished. I just said that isn't the reason I gave it to him.

Mr. Bronson: Q. You were talking about a 36 per cent loss ratio in 1952. That was after some wholesale cancellations, was it not?

A. That is also very indicative of getting rid of

(Testimony of Gerald A. Hatfield.)

sub-standard business and what you had to do to improve the loss ratio.

Q. Well, you happened to pick out one month, February, when he had 40 per cent loss ratio. Does that mean for one month out of the year he just didn't write sub-standard business?

A. Well, I can't answer that; I don't know.

Q. I'm reading from page 59. As I may not be within the scope of the cross examination, I would like to, like the privilege of bringing it out as an adverse witness.

This is on another subject, Your Honor.

Now, this is line 3, page 59 of the bank trial, Mr. Hatfield.

Mr. Garrison: Show it to Mr. Hatfield so he can know what you are——

Mr. Bronson: I am taking that page and that's on—— A. Line what?

Mr. Bronson: Q. The whole page, please, from line 3.

This is a question by Mr. McCallum:

“Question: Now, do you recall receiving from [285] Mr. Lotz a request for a supply of contracts the latter part of August 1951?

“Answer: For a supply of contracts?

“Question: Yes, policies, you call them policies rather than contracts?

“Answer: Oh, a supply of policies, yes.

“Question: In fact, you personally saw to it that he received those policies, didn't you?

(Testimony of Gerald A. Hatfield.)

“Answer: I instructed my home office underwriting department to ship them to him, yes.

“Question: I show you, Mr. Hatfield, the telegram bearing the date of August 24, 1951, addressed to Joe Lotz, purported to have been sent by you, and ask you if that was sent by you?

“Answer: Yes, sir, it was sent by me.

“Question: On that, about that date?

“Answer: On August 24, yes, sir.

“Mr. McCallum: May I read this, please, Your Honor?

“Addressed to ‘Joe Lotz, 315 Fourteenth Street, Oakland, California.

“‘2600 automobile and 1000 mobile home policies shipped 8/22. 2400 automobile policies being sent today. Gerald A. Hatfield.’ ”

And then there is an offer of it in evidence. [286]

The Witness: That is not an unusual request to receive.

Mr. Bronson: There is no question.

May I have a minute, Your Honor?

That concludes the examination, Your Honor.

Mr. Garrison: I have one or two questions, Your Honor.

Redirect Examination

Mr. Garrison: Q. Mr. Hatfield, referring to the functions of the general agent, Mr. Lotz, will you state to the Court what functions under your contract he performs himself without assistance or direction or supervision from the company and those that the company might supervise?

(Testimony of Gerald A. Hatfield.)

A. Yes, he performs all the necessary operations inherent in operating an agency, such as typing of the policies, issuing endorsement, collecting premiums for the policies, providing or effecting cancellations when they become necessary, renew premiums on the cancellation, the handling of losses and adjustment expense.

Q. How about the question of maintaining his bank accounts? A. And it is his duty.

Q. The company has nothing to do with that whatever? A. No, sir.

Q. So that insofar as that activity is concerned, that is his own business and under his contract he may do it in any way he pleases? [287]

A. Yes, sir.

Q. And when you answered my question that Mr. Bronson referred to, the question being the agent is an independent contractor, he keeps his own books and his own bank account, that is correct, you had reference to keeping his own books and his own bank account? A. Right.

Q. When I referred to the manner of keeping his own bank account you anticipate that he will abide by the law with regard to trustee funds, don't you?

Mr. Bronson: Object to that, Your Honor. That is a little below the belt.

Mr. Garrison: That, I think, goes without saying.

Mr. Bronson: I don't think it does at all. He gets an answer and then there is a colloquy between

(Testimony of Gerald A. Hatfield.)

the counsel and then comes the leading questions to rescue—. Your Honor, that is going too far, a very important issue in the case.

The Court: Let the question and answer go out. Proceed.

Mr. Bronson: If there is an answer.

The Court: The question and the answer.

Mr. Bronson: My hearing is failing, Your Honor.

Mr. Garrison: The fact of keeping of a bank account is a matter for the general agents.

Mr. Bronson: Again, we are supposed to hear the facts from the witness, the fact should come from the man on the [288] stand.

Mr. Garrison: I must indicate the subject matter I want the witness to answer.

Mr. Bronson: That isn't the way it is worded.

Mr. Garrison: Q. Isn't it a fact, Mr. Hatfield, that the banking of the funds of the agent is a matter for his own business judgment?

A. Yes, it is.

Q. Do you know what commissions were paid Mr. Lotz by the Mid-States Insurance Company in the year 1951?

A. I have a transcript of them here in my pocket.

Q. Will you tell us how much money was paid to Mr. Lotz by the Mid-States Insurance Company in the year 1950?

A. Take a little mental arithmetic.

Q. Well—— A. In the year 1950?

Q. In the year 1950, if it won't take too long.

(Testimony of Gerald A. Hatfield.)

A. No.

Q. You give us the approximate figure.

A. All you want is an approximate figure, isn't it? Is that all you want, an approximation?

Q. Yes, give us the approximate figure, the amount of commissions paid Mr. Lotz by the Mid-States Insurance Company.

Mr. Bronson: You mean premiums or commissions?

Mr. Garrison: Commissions. [289]

Mr. Bronson: May I inquire what the purpose of this is?

Mr. Garrison: I beg your pardon?

Mr. Bronson: What is the purpose? That is not an issue.

Mr. Garrison: You said he couldn't operate his business because the loss ratio—I want to show that he received very substantial commissions from the Mid-States Insurance Company.

Mr. Bronson: This is 1950?

Mr. Garrison: 1950.

The Witness: 1950, approximately \$69,000.

Mr. Garrison: Q. Can you tell us the amount of money that was either paid to him or credited to his account by Mid-States for commissions in the year 1951? A. Approximately \$30,000.

Q. And I believe you testified that—did you testify to the loss ratio for the year 1950?

A. Yes.

Q. What was that?

A. I don't remember what the figure was.

(Testimony of Gerald A. Hatfield.)

Q. What is the loss ratio for the year 1951?

A. I think it was read into the record at 71 per cent, wasn't it?

Q. That meant that after the retention by the company the balance was left as commission for Mr. Lotz?

A. That's right.

Q. And had the business been allowed to run off normally and [290] there had not been the difficulties that we have referred to here, Mr. Lotz would have received the net commission payable to him for that year's business?

A. Yes, sir.

Q. And you have the amounts of commissions for the years beginning 1947 right on down to 1951?

A. Yes, sir, I have them here.

Q. And did he receive substantial sums during those years?

A. He did.

Mr. Bronson: Object to that, the word "substantial" doesn't mean anything relatively.

Mr. Garrison: Q. Can you give us a total of those after you have computed the figures?

A. Yes, I can run a total.

Q. I won't take the time to have him do that now, but ask that go in at a later time.

In reference to the year 1951 did you understand my question to include both paid to Mr. Lotz and credited to Mr. Lotz?

A. No, I only gave what was paid to Mr. Lotz.

Q. What was paid or credited to his account by way of commission?

(Testimony of Gerald A. Hatfield.)

A. It looks like there was an additional ten thousand credited to him.

Q. And those amounts were, in the year 1950 and 1951, paid to him as commission after all loss and retention by the company [291] for its portion?

A. That's correct.

Q. All losses paid, loss expenses and company's retention?

A. That's correct.

Q. And that would be true for the commissions paid to him each year from 1947 on?

A. Yes, sir.

Q. I believe you testified, Mr. Hatfield, regarding the procedure for the payment of the premium by the sub-agent in respect to his commission, did you not?

A. I believe so.

Q. Now, assuming in Mr. Lotz' case that a particular policy was cancelled, either at the request of the assured or for any reason, and assuming a return of a portion of the premium was due to the assured—you understand me?

A. Yes, sir.

Q. What function would Mr. Lotz have with respect to the return of that premium to the assured?

A. It would be up to him to pay the assured.

Q. Out of what funds?

A. Have to take it out of his trustee account.

Q. So that would show on the bookkeeping between the general agent and the company as a debit item paid by him in return premium?

A. Yes, sir. [292]

Mr. Garrison: I think that is all.

Mr. Bronson: That is all, Your Honor.

The Court: Step down.

(Witness excused.)

Mr. Garrison: Call Mr. Smead.

RALPH L. SMEAD

called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Court: What is your full name?

The Witness: Ralph L. Smead.

The Court: What is it?

The Witness: Ralph L. Smead.

The Court: Where do you live?

The Witness: In Santa Monica, California.

The Court: What is your business or occupation?

The Witness: I am an insurance agent and broker.

The Court: How long have you been so engaged?

The Witness: Since October 1953.

The Court: Is that your first experience in the insurance business?

The Witness: No, sir, I have had about eight or nine years in the business.

The Court: Where? [293]

The Witness: I have worked as a solicitor of insurance.

The Court: Where?

The Witness: In Santa Monica. I have worked for Mr. Lotz as a manager, and I have worked for the American Plan Corporation as a West Coast manager.

(Testimony of Ralph L. Smead.)

The Court: Been in the insurance business how long altogether?

The Witness: Between eight and nine years.

The Court: Take the witness.

Direct Examination

Mr. Garrison: Thank you, Your Honor.

I called Mr. Smead as an adverse party; he is a party defendant in this case.

Q. When were you first employed, Mr. Smead, by Mr. Lotz? A. October 1950.

Q. And prior to that time I believe you had been employed in Santa Monica? A. Yes, sir.

Q. And by whom?

A. By my brother, Ernest Smead.

Q. His business?

A. An insurance agent and broker.

Q. Had you had any employment with the Government?

A. Yes, sir, I worked for the Government for one year as a [294] compensation claims examiner.

Q. And you worked for Mr. Lotz how long?

A. From October 1950 until November 1951.

Q. And then you were employed by the American Plan?

A. From January 1952 until October 1953.

Q. In the year 1950 what were your duties for Mr. Lotz?

A. 1950 I was an underwriter for Mr. Lotz.

Q. And then you were given some other assignment, were you?

(Testimony of Ralph L. Smead.)

A. 1951 I was office manager, and then in later '51 I was his general manager.

Q. And as office manager, what were your duties?

A. Supervision of the office employees, primarily; supervision of underwriting and general office procedure.

Q. Accounting for the books, did you supervise that? A. Not as office manager, no, sir.

Q. And as general manager, did you?

A. Yes, sir.

Q. We have referred here previously to a reinsurance transaction involving Public Service Insurance Company and the American Plan, or the American Fidelity Insurance Company. I believe that occurred in the fore part of 1951. Do you recall that transaction? A. Yes, sir, I do.

Q. And will you describe the nature of that transaction?

A. That occurred, I believe, in July, and—
The Court: 1951?

A. (Continuing) And of course—of 1951, yes, sir. And it involved the reinsurance of a block of business by the American Fidelity and Casualty Company from Public Service Insurance Company.

Q. Was that reinsurance arranged by Mr. Lotz' office? A. Yes, sir, it was arranged.

Q. Did you participate in that deal?

A. Yes, sir.

Q. How was that accomplished, that particular insurance feature?

(Testimony of Ralph L. Smead.)

A. Well, that was handled on a reinsurance bordereau.

Q. What do you mean by that?

A. Well, where in that case American Fidelity and Casualty Company assumed the interest of Public Service Insurance Company on a bordereau reporting basis without cancellation of the policies or without notice to the public.

Q. The policies were continued in force, the Public Service policies? A. Yes, sir.

Q. The liabilities assumed by American Fidelity? A. Yes, sir.

Q. What do you mean when you use the term "bordereau"?

A. Well, that is a reporting form used that gives the policy holder's name and the policy number and the unexpired term, [296] premium.

Q. Bordereau furnished for each policy or bordereau——

A. No, it is one complete accounting form.

Q. Shows the entire block of business reinsured?

A. Yes, sir.

Q. And then how did American Fidelity—how were they paid for their liability assumed?

A. Well, they were paid 75 per cent of the premiums reinsured by Public Service directly.

Q. And that was for the unearned portion of those policies?

A. For 75 per cent of the unearned portion, yes, sir.

(Testimony of Ralph L. Smead.)

The Court: I didn't follow that. Will you read that?

(Record read.)

Mr. Garrison: Q. I assume that the American Fidelity and Casualty, the reinsurer, expected to be paid the full 100 per cent of the unearned premium on those policies?

A. Yes, sir; 25 per cent was to be paid by Mr. Lotz.

Q. So that was the way the deal was handled, the 75 per cent paid by the ceding company, or Public Service, 25 per cent to be paid by Lotz?

A. Yes, sir.

Q. Then how was Mr. Lotz going to profit by that transaction if he paid 25 per cent of the unearned premium to the American Fidelity?

A. Well, of course he had a contract with American Fidelity [297] where he was guaranteed 20 per cent, and I believe the company had a fifteen per cent retention.

Q. I see.

A. And his profit, of course, would be anything over the twenty, and be contingent on the loss experience developed.

Q. In other words, if the loss experience was anything less than the guaranty of twenty, that would come to him? A. Yes, sir.

Q. I believe in the month of August 1951 there was an account owing to Mr. Lotz to the American Fidelity and Casualty Company?

A. Yes, sir, there would be.

(Testimony of Ralph L. Smead.)

Q. And was a check sent to the American Fidelity and Casualty that did not clear the bank in that month?

A. I believe it was either July or August that it was sent; I believe it was August of 1951.

Q. And you remember the amount of that check?

A. Fifty some odd thousand dollars.

Q. And at that time had the Public Service transaction that we have been referring to been completed?

A. The reinsurance transaction, I believe it had, yes, sir.

Q. And had Mr. Lotz forwarded his 25 per cent of the unearned premium?

A. I don't believe he had, no, sir.

Q. Had you had any communications from the American Fidelity or American Plan regarding either of those two items? [298]

A. We had had, after the \$50,000 check was returned by the bank, refused payment, we had contact with American Plan, yes, sir.

Q. And how did you have that, what form?

A. By telephone.

Q. From whom?

A. From Mr. Hart, I believe, the call came from.

Q. Was that to you or Mr. Lotz?

A. I believe that was to both Mr. Lotz and myself.

Q. And you recall what the conversation with Mr. Hart was on that occasion?

A. Well, he wanted to know why the check had

(Testimony of Ralph L. Smead.)

not been honored by the bank, and he was somewhat disturbed because of the fact it wasn't honored. We explained to him, Hart, that it was returned by the bank because of uncollected items and not because of insufficient funds.

Q. Was there anything said at that time or about that time regarding the financial statement?

A. Yes, I believe there was.

Q. What was said?

A. Mr. Hart asked for a financial statement.

Q. Was that financial statement ever furnished him? A. No, sir.

Q. And subsequent to that did you have a further conversation with Mr. Hart regarding your coming to New York? [299]

A. Yes, sir, during the early part of August, 1951, we had a conversation by telephone, telephone conversation, and I think we also had teletype messages with him about that time.

Q. You did have a teletype receiving and sending unit in your office, did you?

A. Yes, we did.

Q. And American Plan had one in New York?

A. Yes, sir.

Q. And what was the conversation regarding the proposed trip to New York?

A. Well, the conversation was about the 25 per cent reinsurance funds that we had not paid to Public Service—or paid to American Plan, and also about a balance that was due, I think, August 15, and Mr. Hart said he wasn't too concerned about

(Testimony of Ralph L. Smead.)

the six thousand some odd dollars represented by the 25 per cent, but he was concerned if we couldn't pay that what were we going to do when our regular statements became due.

Q. And for what period was that August statement?

A. I believe that would be—at that time I believe we had a 75 day contract, so it would be 75 days previous.

Q. That would be a part of May, part of June?

A. Let's see. Probably would be the May account.

Q. And at that time did you have sufficient funds in your trustee account to pay the 25 per cent reinsurance item of \$6,600? [300]

A. I don't believe we had. I am pretty sure we hadn't paid it as of that time.

Q. Let me ask you, Mr. Smead, what bank accounts did Mr. Lotz maintain at that time?

A. He maintained a trustee account, and also an operating or commercial account.

Q. And into what funds did he deposit in the trustee account?

A. The premiums collected.

Q. And what funds went into the operating account?

A. Well, those were funds that he transferred from his trustee account as operating funds.

Q. Did you keep your premium funds segregated and in the trustee account?

A. Yes, sir.

(Testimony of Ralph L. Smead.)

Q. Did you have a written contract with the American Fidelity and Casualty Company?

A. Yes, sir.

Q. Did that contract require you to keep your premium funds segregated and in a trustee account?

Mr. Bronson: The contract is the best evidence of what it contains; we will object on that score.

Mr. Garrison: Withdraw the question. We can cover it in another way.

Q. Did you go to New York?

A. Yes, sir. [301]

Q. And who accompanied you?

A. Mr. Lotz.

Q. And when did you make the trip?

A. I believe we arrived in New York August 13.

Q. Remember approximately the time of the day?

A. I think we arrived around eleven o'clock or so at the airport.

Q. Morning? A. Yes.

Q. And did you have a meeting with officials of the American Plan or the American Fidelity?

A. Yes, sir.

Q. Where?

A. In the American Plan office in New York.

Q. And who was present at that meeting?

A. Mr. Hart, Mr. Sudekum——

Q. Who was he?

A. Mr. Sudekum was executive vice-president.

Q. Of——?

A. American Plan. Mr. Will, who was, I believe,

(Testimony of Ralph L. Smead.)

secretary and treasurer of American Plan; Mr. Feller, I believe, was counsel for American Plan; Mr. Lotz and myself.

Q. And will you give us as best you can the conversation that occurred there between the different parties?

A. Well, we talked primarily about the status of Mr. Lotz' [302] agency, about the balances due companies and the accounts that he had receivable.

Q. Did you state to anyone at that time what they were? A. I believe we did, yes, sir.

Q. What did you say in that regard?

A. I believe we furnished the amounts, the records that we had.

Q. You recall what those were?

A. The amounts, I believe, that were due the companies—I don't know whether it was total amounts or not.

Q. What was due American Fidelity; let us take it that way.

A. I think it was two hundred forty some odd thousand dollars.

Q. What was due Mid-States?

A. I believe at that time it was approximately \$30,000.

Q. Other companies?

A. Other companies, I believe it was around ten or twelve thousand dollars.

Q. Yes. Go ahead, finish the conversation.

A. We advised that we had approximately \$75,000 in receivables at that time, and we talked about

(Testimony of Ralph L. Smead.)

continuing our business relations with the American Plan, which they would not consent to, and we advised that if we were to pay them off that we would have to stay in business and have to continue writing, and we spoke about Mr. Lotz going to Chicago to make arrangements, or attempt to make arrangements with Mid-States Insurance [303] Company, whom he was also under contract with, to see if he couldn't write more business with them and renew his relationships more or less and—and we talked about the only way we could pay off American Plan would be from our premium funds that were collected from our new writings, as we only had approximately \$75,000 in receivables.

Q. How would you do that?

A. Well, it would be on the credit period allowed by the new company—or under the new business written.

Q. Anything said in that conversation about whether you could or could not continue to represent the American Plan?

A. Yes, sir, it was understood that we were not.

Q. What was said about that and by whom?

A. Well, Mr. Hart said definitely he would not continue business relationships with us.

Q. And——

The Court: With you?

The Witness: With Mr. Lotz.

Mr. Garrison: Q. Were any arrangements made for you to leave New York, either you or Mr. Lotz?

(Testimony of Ralph L. Smead.)

A. Yes, sir, it was decided that I was to return to Oakland that same night, but Mr. Lotz going to Chicago a day or so later.

Q. What was said about Mr. Lotz going to Chicago, and what was he to do?

A. Well, first—excuse me. It was decided that it would be [304] best to telephone Mid-States in Chicago.

Q. Try to give us the conversation as best you can without the conclusion of it. If you can tell us what you said, that will be fine.

A. Well, Mr. Hart asked Mr. Lotz to call Mid-States in Chicago for Mr. Hatfield, and he asked his operator to place a call for Mr. Lotz and instructed her to place the call station-to-station.

Q. And the conversation regarding that particular act?

A. Yes, there was, Mr. Hart said that he did not wish for Mid-States to know Mr. Lotz was there in his office.

Q. Was the call placed?

A. The call was placed.

Q. Does that round out the conversations that occurred, as best you can remember them?

A. Well, I believe that probably covers that conversation. We had further conversations that night while we were having dinner with Mr. Hart, Mr. Sudekum, Mr. Feller, Mr. Lotz and myself.

Q. What was said at that time?

A. Well, at that time we talked about the contract with Mid-States, and it was said by, I think,

(Testimony of Ralph L. Smead.)

everybody present that everything depended upon whether Mid-States would allow Mr. Lotz to continue business with them.

Q. Wasn't there at some time or other some question by one of [305] the persons regarding what would happen if this thing went through?

A. Yes, I believe there was. Mr. Will, I believe—in fact, I know it was——

Q. Who is Mr. Will?

A. Mr. Will was the secretary and treasurer, I believe, of American Plan, and he asked the question, "Well, what will happen when Mid-States finds themselves in the position that we are now in?"

Mr. Hart remarked that he would worry about that if the time ever came.

Mr. Garrison: Your Honor wish to take a recess?

The Court: Take a recess.

(Short recess.)

Mr. Garrison: Q. Did you complete the substance of the conversation that occurred in New York?

A. We talked about, in addition to that, I believe, the possibility of Mr. Lotz obtaining a loan of some \$50,000 from a connection in Oakland, and also that we hoped to make an underwriting profit off of our business. I think that just about completes it.

Q. Wasn't there something said about Mr. Cass in Chicago?

A. I don't recall whether it was in the conversation in Mr. Hart's office or whether it was that

(Testimony of Ralph L. Smead.)

night during dinner, but there was a conversation regarding Mr. Cass in Chicago. [306]

Q. By whom and what was said?

A. Mr. Lotz said that while in Chicago he was going to contact Mr. Cass, and Mr. Hart asked Mr. Lotz definitely not to contact Mr. Cass. Mr. Hart stated that Mr. Cass possibly would still be friendly with Mid-States Insurance Company and he might divulge our plans with someone in that organization.

Q. Then I take it you returned to Oakland?

A. Yes, sir, I returned to Oakland.

Q. Mr. Lotz went on to Chicago.

A. Yes, sir.

Q. And what was said about what you were to do when you returned to Oakland?

A. Well, it was decided that——

Q. What was said?

A. Well, I said that I could possibly return to Oakland and collect some of the premiums that were due on the August 15th statement.

Q. And was that August 15 account delinquent at that time?

A. At that time it was not.

Q. And when was it payable?

A. It was payable on the 15th.

Q. This was on the 13th?

A. On the 13th, I believe, yes, sir.

Q. Did you have money in the trustee account at that time sufficient to meet that payment? [307]

A. No, sir, I don't believe we did.

(Testimony of Ralph L. Smead.)

Q. How much was that?

A. I am not sure what that amount was.

Q. And did you attempt to collect accounts on your return? A. Yes, sir, I did.

Q. Did you have any conversations shortly after your return with Mr. Hart? A. Yes, I did.

Q. And what—through what medium?

A. Through a telephone.

Q. And what were those conversations?

A. The conversations were about the collections, and also——

Q. What did you say to him and what did he say to you?

A. Well, I told him that, that I was having trouble collecting our balances, they actually weren't due from our sub-agents, and our accounts receivable was so low that definitely wasn't going to be able to pay that account at that time.

And also during those conversations I informed Mr. Hart about the subject of rewriting some business the Public Service Insurance Company in San Francisco was going to cancel.

Q. This is a different and a later transaction than the one we have talked about formally?

A. Yes, sir.

Q. What was said about that?

A. Well, I told him that Mr. Russell and Mr. Shay of the [308] Public Service Insurance Company contacted me and had advised me that they were having difficulties with the California Insurance Department, and they had to cancel some of

(Testimony of Ralph L. Smead.)

their business and have it reinsured, and we had been unable to assist them on a reinsurance bordereau such as we had transacted earlier, and it was necessary that they cancel the policies.

And I told Mr. Hart that we were planning on rewriting some of that business. I am not sure in my mind just where the plan to rewrite the business, the Public Service business developed, however, but it was during that period.

Q. You are not sure whether it was your idea or someone else's?

A. I am not positive, no, sir.

Q. All right. But is that the substance of that conversation?

A. I believe it about covers it, yes, sir.

Q. Well, as of what date did these phone calls occur?

A. Well, these calls occurred, I believe, on the 16th, 17th, 18 of August.

Q. 1951? A. 1951, yes, sir.

Q. Had you made some payments on the American Fidelity account up to this time?

A. Up to that time I don't believe we had. [309]

Q. And was there a May balance due shortly after this August you referred to?

A. Well, I believe the August statement I am speaking of would be the May balance.

Q. In other words, you were talking about the May balance when you referred to——

A. I believe that would be the——

Q. The balance payable in August?

(Testimony of Ralph L. Smead.)

A. Yes, sir.

Q. And you don't recall the amount of that?

A. I know we had one large, very large balance due about that time, but I can't recall offhand what the amount was.

Q. Well, in this conversation about cancelling the Public Service Company, cancelling the policies that they were required to cancel, was there any discussion as to the rewrite of that business in some other company?

A. Yes, sir, there was.

Q. In your conversation with Mr. Hart?

A. Yes, sir.

Q. What was that?

A. I told him that we planned on rewriting this business in the Mid-States Insurance Company. Mr. Lotz at the time of the first conversation was still in Chicago, I believe.

Q. Did you talk to Mr. Lotz at all?

A. I called Mr. Lotz in Chicago and told him I had been [310] discussing with Mr. Russell and Mr. Shay, I believe also Mr. Bond of the Public Service Insurance Company, and that we could pick up a large block of business on a rewrite basis, and I asked Mr. Lotz to contact the officials of Mid-States Insurance Company while he was there and advise them of what we intended to do.

Q. And were you continuing your efforts to make collections on the Lotz account during this period?

A. Yes, sir.

Q. And had not been successful?

(Testimony of Ralph L. Smead.)

A. Well, there were collections made, but not substantial.

Q. Then what next occurred in the course of events with respect to Mr. Hart?

A. Well, I believe on August 20—well, before August 20—on August the 18th or 17th, thereabouts, we had a teletype message from Mr. Hart stating that—to make reservations for he and Mr. Feller in Oakland for the following Monday, which we did, and confirm the reservations by teletype.

Mr. Hart arrived, I believe, on Monday, the 20th of August, 1951.

Q. Did you meet with them after they arrived?

A. Yes, sir, I did.

Q. Where did you first see them?

A. I believe I first met them in Mr. Lotz' office.

Q. And you remember the date? [311]

A. On the same day they arrived.

Q. The 20th?

A. The 20th I believe was the date.

Q. And what did they do there that day?

A. Well, they first, approximately the first thing they did was to ask for a tape on the amounts that we owed, and the amounts we had receivable.

Q. What do you mean by "tape"?

A. Well, from our bookkeeping department, the balances, to run from our records what the balances were.

Q. Tabulation? A. A tabulation.

Q. Was that provided for them?

A. Yes, sir, those figures were provided. In ad-

(Testimony of Ralph L. Smead.)

dition to that information, they also asked for listing of business owed by sub-agents to Mr. Lotz for the American Fidelity and Casualty Company. This information, I believe it took our girls two or three days to work up, and I don't believe we ever gave that particular information to Mr. Hart.

Q. Did you give them any figures regarding the affairs or financial condition of Mr. Lotz' office?

A. We gave them the figures that they asked for.

Q. That is what?

A. Receivables and payables.

Q. Would that include the balances due them and the Mid-States [312] Insurance Company?

A. That included all balances.

Q. And were those figures substantially different than the ones you reported to them in New York?

A. I think they were approximately the same.

Q. Now, what was occurring at this time when they were here with respect to the Public Service rewrite transaction?

A. Well, we were in the process of consummating the arrangement with the Public Service, I believe, on August 20. On the night of August 20 Mr. Lotz and myself met with Mr. Russell and Mr. Shay of Public Service in Mr. Lotz' office and executed a commission agreement payable to Russell and Bond who were underwriting managers and attorneys in fact of the Public Service Insurance Company.

Q. What was the arrangement with respect to

(Testimony of Ralph L. Smead.)

receiving unearned—the unearned premium on any——

Mr. Bronson: Is that part of the written agreement?

Mr. Garrison: Q. Did you have a written agreement with Russell and Bond regarding the payment by them of the unearned premium?

A. We had a written agreement with Public Service that covered only the commission and the fee that was to be paid to Russell and Bond as a commission and as a service fee for handling the business. I don't believe there is anything further.

Q. Do you know where that agreement is?

A. Well, the last time I saw it it was in Mr. Lotz' office.

Q. I see. And it provided for a commission to the managers of Public Service.

A. Provided for 25 per cent commission to Russell and Bond. It further provided for a 10 per cent service fee.

Q. Who was to pay that? A. Mr. Lotz.

Q. And did you have conversations, any conversations with Mr. Hart during these times regarding this Public Service deal?

A. Yes, sir, we did. In fact, we told Mr. Hart what we were having to pay for the business, and he said he thought it was all right if it was good business, we would make money on it. Prior to the time we completed the agreement, during the day of the 20th, Mr. Hart asked us to call Public

(Testimony of Ralph L. Smead.)

Service to be sure that we were going to take over that block of business.

Q. And did you call them?

A. Yes, sir, we did.

Q. And confirmed the fact that they would go ahead with it? A. Yes.

Q. How long did Mr. Hart and Mr. Feller remain in Oakland on that trip?

A. Two or three days, I believe, was the extent of their visit.

Q. Did Mr. Lotz return while they were still here? [314]

A. Yes, sir, I believe he was present. Yes, sir, he was present.

Q. Was he present when these conversations occurred that we just have been talking about?

A. He was present at the conversation when we called Public Service, he was present when we advised Mr. Hart of the commission arrangement with Public Service, yes, sir.

Q. What was the total amount of money involved in that Public Service rewrite?

A. Well, the gross amount that was, I think it was around \$150,000, I am not positive of the figure. I believe the net premiums that we received on the transactions amounted to approximately \$100,000.

Q. In other words, you received about \$100,000 from the Public Service Company?

A. About that. It might be in excess of that.

Q. And that represented the unearned premium reserve, so-called?

(Testimony of Ralph L. Smead.)

A. Well, that represented the—that represented 25—or 75 per cent of the premiums written, the gross premium written.

Q. That was figured on the basis of the remainder, remaining period the policies had to run?

Mr. Bronson: I can't quite hear that. Will you repeat it?

Mr. Garrison: Q. Was that figured on the basis of the remaining period that the policies had to run? [315]

A. We wrote short-term policies on the pro rata unexpired term of the Public Service policy, full premium of our policy.

Q. In other words, can you explain that to the Court how that was accomplished?

A. Well, ordinarily the policies are written on an annual basis or semi-annual, or longer terms, and these policies were written for shorter terms, on an average, than the annual policy. The Public Service had cancelled their policies, and they still had a time to run before normal expiration, and our policy took effect as of the date of their cancellation and continued until the normal expiration of Public Service.

Q. Was there anything said in any of the conversation with Mr. Hart regarding allowing the Public Service officials to know what Mr. Hart's connection with them was?

A. Yes, there was. Mr. Hart said he did not wish Public officials to be informed of his knowledge of the matter.

(Testimony of Ralph L. Smead.)

Q. Were they informed?

A. They were informed—they were aware of it, yes, sir.

Mr. Bronson: I didn't catch that answer.

The Witness: I said: Yes, sir, they were informed and aware of it.

Mr. Bronson: I didn't hear the question, some kind of a siren going out here.

Mr. Garrison: I asked him——

Mr. Bronson: Might be an ambulance. [316]

The Court: Pardon me, let the reporter read the question.

(Record read.)

Mr. Bronson: I didn't hear the answer or the question. I hate to interrupt again——

(Record read.)

Mr. Garrison: Q. Now, when did you complete the Public Service transaction so far as your arrangement with them?

A. Why, I think it was consummated on August 20; the mechanics of their cancellation and rewrite, I think, commenced during the latter week of August or the early week of September.

Q. And did the Public Service or their managers, Russell and Bond, undertake the rewriting—the writing of the new policies?

A. Yes, sir, that was part of the agreement that they were to handle the mechanics of the issuance of the new policies.

Q. In Mid-States?

A. In Mid-States.

(Testimony of Ralph L. Smead.)

Q. And that was what their fee was paid for, the manual typing?

A. That was the 10 per cent fee.

Q. So that did you provide them with Mid-States policies? A. Yes, sir.

Q. And the cancellation notices?

A. Well, their policies carry their own cancellation notices.

Q. And Mr. Hart and Mr. Feller were still in Oakland at this [317] time on the 20th?

A. They were still in Oakland on the 20th, in Oakland, yes, sir.

Q. And did you see them every day while they were here? A. Yes, sir.

Q. Now, was there any conversation with Mr. Hart regarding this May balance that you say you were trying to collect and not succeeding?

A. Yes, sir, there was.

Q. And what was said about that?

A. We gave Mr. Hart, while he was here, the 20th or 21st, a check, I believe, for \$20,000 from Mr. Lotz' trustee account. And also while Mr. Hart and Mr. Feller were here we attempted to obtain a loan in the amount of \$50,000.

Q. From whom?

A. Well, we attempted to obtain the loan, I believe, from the Central Bank in Oakland, and also from a party that Mr. William Mead—now, I don't know whether he actually contacted that party or not, but I know Mr. Hart and Mr. Feller did attempt to make arrangements through the Central

(Testimony of Ralph L. Smead.)

Bank, and then Mr. Hart, I believe, failed to accomplish that loan.

Q. That was the loan to be made to Mr. Lotz by the bank?

A. Yes, sir, and based on Mr. Lotz guaranteed commissions with American Plan.

Q. In other words, Mr. Hart wasn't personally trying to [318] borrow any money?

A. No, it was on behalf of Mr. Lotz. Mr. Hart at that time agreed, or stated that he would advance from the American Plan corporation monies \$50,000 in order that the balances due could be paid to the company. He stated that the company had no knowledge—the company itself had no knowledge what was going on, and he wanted to actually keep our account from being delinquent.

Q. And how was that—did he make that loan?

A. I don't know whether he made it actually or not.

Q. Well——

A. I don't know what mechanics would be necessary for him to go through to do it.

Q. Did you show on your books a credit of that May balance?

A. I don't believe we did, no, sir.

Q. But that was the conversation regarding it?

A. Yes, sir.

Q. He said he would make the loan?

A. Yes, sir.

Q. Now, up to this time had you discussed the matter with the Mid-States Insurance Company?

(Testimony of Ralph L. Smead.)

A. This is August the 20th you are talking about?

Q. Yes. A. No, sir.

Q. When did you first discuss the matter with the Mid-States [319] Insurance Company?

A. This is the matter of the rewrite, Public Service?

Q. Yes, talking about Public Service now.

A. Well, the first time I talked to Mid-States, I believe, was in September or October, I am not definite, but I know Mr. Hatfield was, during that time, trying to contact Mr. Lotz to ask him about the business. I am not very definite when I first talked to him at all.

Q. I see. Then I assume you cannot say of your own knowledge whether Mr. Lotz did when he was in Chicago?

A. The only thing I can say is that Mr. Lotz said that he would. Now,—

Q. Do you know whether he said that he did when he got back? A. I am not sure.

Q. Well then, at any rate the Russell and Bond agency undertook this writing of this block of business, did they? A. Yes, sir.

Q. And what was done with either the policies or the face sheet of the policies, or the bordereau, so-called?

A. Well, there was no bordereau involved, it was individual policies.

Q. What did you do with the policies?

A. Well, the policies were—the Public Service

(Testimony of Ralph L. Smead.)

Company issued the notice of cancellation, and at the same time they typed the new Mid-States policy for the unexpired term. We [320] attached a notice to the Mid-States policy stating that it replaced the policy that was being cancelled by Public Service, to be sent to the assured advising them there was no change in their coverage, and this policy replaced their previous Public Service policy. And those were sent out—handled in the normal course of business.

Q. And wasn't there some communication or some document sent to Mid-States?

A. Oh, we sent them the regular daily report, yes, sir.

Q. Yes. And you recall when they were first sent?

A. Well, we sent the daily reports as we received those from the Public Service. They came in—there were quite a few girls working on the project. Public Service had, I think, practically their entire staff, and also we, I think, used some of our girls on it also.

Q. Now, were you writing any business in the American Fidelity and Casualty during this period?

A. No, sir, I don't believe we were.

Q. And where had you received the twenty—from what source had you received the \$20,000 you paid Mr. Hart for American Plan on the 20th?

A. Well, that was monies that we had collected from our regular accounts receivable.

Q. And do you know whether that came from agents writing business in the American Fidelity or

(Testimony of Ralph L. Smead.)

agents writing business in [321] the Mid-States or other companies?

A. Well, I don't know that, they came from agents writing for both companies, I am sure of that, but what the premiums were for, I am not sure.

Q. Now, when did Mr. Hart and Mr. Feller leave Oakland?

A. They left, I believe, on the 22nd of August.

Q. And did you have conversations with them regarding some contracts that were signed by you and Mr. Lotz?

A. Yes, sir, we did on the day, on the day they left Oakland.

Q. And where did those conversations occur?

A. In the Central Bank of Oakland in Mr. Earl Smith's office.

Q. And on what day was that?

A. It was the day they left; I believe it was the 22nd of August.

Q. What time of the day?

A. It was early in the morning.

Q. What was the conversation?

A. Well, they had executed some agreements for Mr. Lotz and I had to sign, and we went over to the bank and signed them.

Q. How many?

A. I believe we signed only one agreement.

Q. I beg your pardon?

A. Only one agreement, I believe.

Q. Did you sign it?

(Testimony of Ralph L. Smead.)

A. I signed an agreement, yes, sir. [322]

Q. I show you an agreement dated August 22 signed by American Plan Corporation, Mark M. Hart, President—correction. American Fidelity and Casualty Company, Inc., by the American Plan Corporation, Inc., Mark M. Hart, President, and Joe Lotz, and then below it says:

“Agreed: Ralph L. Smead.”

Is that the document that you refer to?

A. Yes, sir.

Mr. Garrison: I think I should read the document, Your Honor.

“Memorandum of Agreement between American Fidelity and Casualty Company, Inc. (hereinafter called the Company), The American Plan Corporation (hereinafter called the Manager) and Joseph Lotz, (hereinafter called Lotz) dated August 22, 1951.

“In consideration of the promises herein contained and other good and valuable consideration, it is understood among the Company, the Manager and Lotz as follows:

“1. Lotz as a former agent of the Company has collected or has in the course of collection premiums on behalf of the Company amounting to approximately \$240,000 (as evidenced by accounts current compiled and to be compiled by the Manager) which have not been remitted to the Company or the Manager. [323]

“2. Lotz is also obligated to pay to the Company

(Testimony of Ralph L. Smead.)

a sum approximating \$7,000 in connection with a reinsurance transaction.

"3. Lotz agrees that all the monies referred to in paragraphs 1 and 2 will be paid to the Company on or before September 15, 1951, and Lotz agrees that payments on account of said sums will be made by him at intervals as frequent as possible between the date of this agreement and September 15, 1951.

"4. Commencing immediately all premiums received by Lotz will be deposited directly to the account of the Company at the Central Bank, Oakland, California; Lotz may deduct therefrom a sum not to exceed 10 per cent for operating expenses, which deductions shall be a charge against Lotz and shall likewise be paid to the Company on or before September 15, 1951.

"5. Despite termination of Lotz' agency agreement and subject to further instructions of the manager, Lotz will

"a. Take all necessary steps to collect premiums from sub-agents and assureds and failing to collect will effect cancellations in accordance with established practice. [324]

"b. Supervise and pay losses and loss adjustment expenses.

"c. Effect collection of salvage and subrogation.

"d. Use his best efforts in every respect to protect the interests of the Company.

"6. The Manager agrees, termination of the agency agreement notwithstanding, to credit Lotz monthly with commissions of 20 per cent upon

(Testimony of Ralph L. Smead.)

earned premiums as provided in the agency agreement dated November 7, 1950, but Manager shall have the right to withhold payment thereof as an offset against monies due from Lotz to the Company or monies advanced by the Manager to the Company on Lotz' behalf. This paragraph 6 in no wise shall affect provisions of said agency agreement relating to the withholding of commissions earned in excess of said 20 per cent.

"7. So long as any of the items referred to in paragraphs 1 and 2 shall remain outstanding Lotz will

"a. Maintain his Trustee Account at Central Bank, Oakland, and not open a trustee account at any other bank or trust company.

"b. Not draw from the agency for himself a [325] sum in excess of \$150 a week and will not increase the salaries of any employees except with the specific consent of the Manager or its representative.

"c. Not draw any sums for travel, entertainment, etc., without the specific consent of the Manager or its representative.

"d. Not make any capital expenditures without the specific consent of the Manager or its representative.

"8. The Manager hereby appoints Ralph L. Smead as its representative and Lotz agrees that the said representative shall have full authority over the finances of the Company and in connection with the matters referred to herein subject to in-

(Testimony of Ralph L. Smead.)

structions of the Manager. It is understood that the designation of Smead as representative shall be at the pleasure of the Manager and that the Manager may terminate such appointment and appoint a substitute representative at its discretion which substitute shall have the same authority as the original appointee. It is understood that the appointment of a representative by the Manager shall cease when the items referred to in paragraphs 1 and 2 hereof are fully satisfied.

"9. Lotz agrees that expenses incurred by the [326] Manager in connection with the liquidation of the items referred to in paragraphs 1 and 2 hereof and in the operation and implementation of this agreement shall be proper charges against Lotz.

"10. Except as specifically provided herein, it is understood that this memorandum of agreement shall not be deemed a waiver of any obligations of Lotz or rights of the Company or Manager under the aforesaid agency agreement of November 27, 1950, or otherwise. Without any limitation on the foregoing, it is agreed that in the event of a default by Lotz of any of the provisions of this memorandum of agreement, the Company may without notice exercise its rights under paragraph 4 of the aforesaid agency agreement to take over and vest in itself Lotz' records, use and control of expirations.

"11. The parties hereto agree to execute such further and other documents as may be necessary

(Testimony of Ralph L. Smead.)

to carry out the intentions and objectives of this memorandum of agreement.”

Signed, as I have previously indicated, American Fidelity and Casualty Co., Inc., Lotz and Smead.

Mr. Garrison: Ask this be received in evidence.

The Court: It may be admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 17 admitted and filed in [327] evidence.

(Whereupon Memorandum of Agreement referred to above was received in evidence and marked Plaintiff's Exhibit No. 17.)

Mr. Garrison: Q. Was this document actually executed on the 22nd?

A. As far as I know, yes, sir.

Q. It bears the date at the top, dated the 22nd, but it does not show that that was the date of the execution. But that is your recollection, is it?

A. Well, that is the date that, as I recall the date we signed it was the same date that Mr. Hart and Mr. Feller departed from Oakland.

Mr. Garrison: You wish to take the adjournment now?

The Court: You asked for it.

(Whereupon this cause was adjourned until 10:00 a.m. Thursday, May 6, 1954.) [328]

The Clerk: Mid-States Insurance Company, Plaintiff, and Anglo Bank versus American Fidelity and Casualty Company, further trial.

Mr. Garrison: Ready for the plaintiff.

Mr. McCallum: Ready.

Mr. Tiedeman: Your Honor, at this time, before the witness takes the stand, I would like to ask, on behalf of Defendant Lotz, for your leave to amend the remaining counterclaim in the answer of Defendant Lotz. It seems that Your Honor—Your Honor will remember that both counterclaims and the answer were demurred to and demurrer was sustained as to the first counterclaim.

The second counterclaim, as it stands, is left sort of dangling in the air, because as it was drafted the facts of the first counterclaim I incorporated into the second counterclaim, at least by reference, and in order to make any legal significance out of it I feel it should be amended to contain the facts, or at least some of the facts in the first counterclaim.

Mr. Bronson: We have no objection.

Mr. Garrison: I am not sure that I understand exactly what counsel has in mind. I certainly have no objection to any reasonable statement by Mr. Lotz in a counterclaim, but I [330] don't know now what you actually propose.

Mr. Tiedeman: Well, may I do this, Your Honor, draft——

The Court: Have you your amendment now?

Mr. Tiedeman: No, we want to ask your permission before we present it.

The Court: Counsel wants to know what it is.

Mr. Tiedeman: That is just what I was going to suggest. We will prepare it and submit it to you tomorrow.

The Court: Very well.

Mr. Garrison: With the understanding that, of course, not having seen it we can't agree at this time that it states a cause of action, because that was the issue we had before which Your Honor ruled upon.

The Court: Very well.

Mr. McCallum: Your Honor, my associate, Nathan Berke, has been called to Washington, and he asked me to advise Your Honor why he is not present and asked for your permission.

The Court: Was he associated with you?

Mr. McCallum: Yes, Your Honor.

The Court: How will you be able to get along without him?

Mr. McCallum: Since he hasn't said a word——

The Court: Very well, let us proceed.

Mr. Garrison: Your Honor, I had one question I wished to ask Mr. Hatfield in connection with some testimony he gave [331] before, if I could put him on just briefly out of order.

The Court: Very well.

Mr. Garrison: Mr. Hatfield, please.

The Clerk: Gerald A. Hatfield to the stand, heretofore sworn.

GERALD A. HATFIELD

was recalled as a witness for the plaintiff herein, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified further as hereinafter indicated:

Redirect Examination—(Continued)

Mr. Garrison: Q. Mr. Hatfield, you started to

(Testimony of Gerald A. Hatfield.)

give us the other day the amount of premium, amount of commissions that had been paid Mr. Lotz by the Mid-States Insurance Company, and you started to total them up, and it looked like it was going to take too long, didn't want to take the time of the Court, and ask you if you have totalled up those amounts? A. Yes, sir.

Q. Have you those totals? A. Yes, sir.

Q. Will you tell us what commissions were paid to Mr. Lotz by the Mid-States Insurance Company?

A. Yes, sir, you want the total by years, is that correct?

Q. Yes. [332]

Q. In the year 1947, which was the beginning year, his commissions were actually a minus figure of \$271.00.

The year 1948 he earned commissions of \$24,117.00.

The year 1949, \$48,862.00.

The year 1950, \$70,685.00.

The year 1951, \$31,704.00.

Q. Those are actual payments?

A. No, not in the year 1951. The actual payments in the year 1951 were \$27,806.00. In 1952—this is not a payment—this is a credit to his account, \$35,495.00. The year 1953, \$7,088.00. I didn't total them up, sir.

Q. Excepting the year '52 and '3, they were actual cash payments? A. Yes, sir.

Mr. Garrison: That is all. Any cross examination?

(Testimony of Gerald A. Hatfield.)

Mr. Bronson: No.

Mr. Garrison: Step down. Thank you.

(Witness excused.)

Mr. Garrison: Mr. Smead, please.

The Clerk: Ralph L. Smead to the stand, heretofore sworn.

RALPH L. SMEAD

was recalled as an adverse witness for the plaintiff herein, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, testified further as follows: [333]

Direct Examination — (Continued)

Mr. Garrison: Q. You testified yesterday, I believe, Mr. Smead, that the commission contract that was entered into with the public service company was executed on August 20? A. Yes, sir.

Q. What time of the day or night?

A. I believe it was actually signed at night.

Q. And was Mr. Hart and Mr. Feller in the city of Oakland at that time? A. Yes, sir.

Q. Was that contract shown to them?

A. I am not positive whether it was or not.

Q. Was it discussed with them?

A. Yes, sir.

Q. Was the terms of it discussed?

A. Yes, sir.

Q. Now, at the time you met Mr. Hart and Mr. Feller at the Central Bank, you testified, I believe, that an envelope was handed to you as they were

(Testimony of Ralph L. Smead.)

leaving and that after they left you opened it and read it? A That is true, yes, sir.

Q. I show you a letter dated August 17, headed the American Plan Corporation, addressed to Mr. Ralph L. Smead, and ask if you can identify that.

A. Yes, sir, this is the letter that I was handed in the [334] sealed envelope.

Q. By Mr. Hart?

A. I believe it was by Mr. Feller.

Q. In Mr. Hart's presence? A. Yes, sir.

Mr. Garrison: Ask this be received as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 18 filed, admitted and filed in evidence.

(Whereupon Letter addressed to Mr. Ralph L. Smead, dated August 17, was admitted into evidence and marked Plaintiff's Exhibit No. 18.)

Mr. Garrison: I will read the letter for the record, if the Court please:

"The American Plan Corporation, 44 Wall Street, New York, N. Y.

"August 17, 1951.

"Mr. Ralph L. Smead, 315 Fourteenth Street, Oakland, California.

"Dear Mr. Smead:

"Under even date memorandum of agreement has been executed by Joseph Lotz which in part stipulates that you will serve as the representative of American Plan [335] Corporation with respect to

(Testimony of Ralph L. Smead.)

the ultimate liquidation of all monies referred to in paragraphs 1 and 2 in said agreement.

"As the representative of this corporation, you have full authority to deposit to the account of The American Fidelity and Casualty Company at the Central Bank in Oakland all monies received by Lotz, after taking into consideration the deduction prescribed in said agreement. You are to have full and supreme authority regarding financial affairs of Joseph Lotz, subject to instructions that may be transmitted to you from time to time by The American Plan Corporation, and in the event that you are prevented from performing your responsibility in any respect it will be your duty to notify immediately The American Plan Corporation.

"In consideration of the proper performance of your duties as representative and in the event the items referred to in paragraphs 1 and 2 of said agreement are completely liquidated by September 15, 1951, you are to receive a fee from us in the sum of \$1,000.00.

"Yours very truly, Mark M. Hart, President"

Q. And now, at this time, as I understand it, you were in the employ of Mr. Lotz? [336]

A. Yes, sir.

Q. And the items 1 and 2 of the contract referred to herein are the balances due American Fidelity and Casualty Company, are they not?

A. Yes, sir.

Q. What did you do after you opened that envelope and read this letter?

(Testimony of Ralph L. Smead.)

A. Well, I was very surprised of this offer, there had been no previous discussion of it. I talked with Mr. Earl Smith, Vice President of the Central Bank about it. He had a copy of the other agreement that was executed, and he advised me——

Q. No, you wouldn't be permitted to say what he said to you. You did have a conversation with him?

A. Yes, sir.

Q. And then what did you do after that conversation?

A. Well, the night, I believe it was the 22nd, I called Mr. Hart in Los Angeles and told him that it was not necessary to pay me anything for this and I didn't want any part of it.

Q. What did he say?

A. He said all right.

Q. When did you actually start the re-writing of this business that was taken over from the Public Service Company and placed in the Mid-States Insurance Company?

A. Well, the actual work began, I believe, the last week of August or the first week of September, 1951. [337]

Q. And Mr. Hart and Mr. Feller had in the meantime left Oakland and returned to New York, had they?

A. They had left Oakland, yes, sir.

Q. Did you hear from them shortly after that?

A. Yes, I did, from Mr. Hart.

Q. I beg your pardon?

A. From Mr. Hart.

(Testimony of Ralph L. Sinead.)

Q. And in what manner did you have communications with him?

A. By telephone, and also, I believe, by teletype. There were, I know, several telephone calls during that period.

Q. And did those telephone calls involve this Public Service deal? A. Yes, sir.

Q. And what was said in those conversations by Mr. Hart?

A. Mr. Hart asked how the re-write of this business was progressing.

Q. The mechanics of it.

A. Yes, sir. [338]

Q. The mechanical work.

A. And he said he was very anxious to get that through, that his balances had to be liquidated. So we had originally made an agreement with Public Service, or Russell and Bond, for them to do the work themselves, but due to the fact that there was so much pressure we threw some of our girls in to do the work, too, and they did a lot of overtime work on the rewrites.

Q. What do you mean by "pressure"?

A. Well, he was demanding his money and they wanted to clear it up by the 15th.

Q. Clear it up by the 15th of what month?

A. Of September, 1951.

Q. You mean this was the end of August?

A. Yes, sir, during the last two weeks of August.

Q. Did you receive any instructions from anyone

(Testimony of Ralph L. Smead.)

in the American Plan Corporation or American Fidelity from New York regarding having the bank make automatic transfers from funds from the trustee account to the American Fidelity account?

A. Yes, sir, I had the teletype message, I believe it was Mr. Will, asking that we arrange with the Central Bank to automatically transfer the funds from Mr. Lotz' trustee account to an account of the American Fidelity and Casualty Company at the bank.

Q. Was that done?

A. We did not make those arrangements, no, sir. [339]

Q. They were not automatically transferred?

A. We had to make the transfers ourselves.

Q. Well, now, at about this time one of the accounts of Mid-States became due, did it not?

A. I believe there was an account due Mid-States in September, yes, sir.

Q. And do you recall the approximate amount of that?

A. I believe it was approximately \$27,000.

Q. Did you talk with Mr. Hart about that Mid-States' account in respect to the payment of it?

A. Yes, sir, I did.

Q. How did you do that?

A. By telephone. I advised Mr. Hart the account was due. I believe Mr. Lotz also talked to him. And that we had to pay Mid-States this \$27,000, so he agreed to it. He said we better pay it.

Q. So they were paid that amount?

(Testimony of Ralph L. Smead.)

A. Yes, sir, I believe in October.

Q. That had the effect of keeping their account current, then?

Mr. Bronson: I am sorry, I didn't hear that.

A. Yes, sir.

Mr. Garrison: I said that had the effect of keeping Mid-States account current by that payment.

Mr. Bronson: What was the answer?

The Court: The answer was, "Yes, sir". [340]

Mr. Garrison: Q. We were talking a little bit about reinsurance through a Bordereau Method and rewriting after a flat cancellation. You explained the differences, I believe, to the Court, those two insurance, types of insurance transactions. I want to ask you now in the Bordereau—withdraw that.

I believe you also said that the first Public Service transaction with the American Fidelity was by the use of a Bordereau.

A. Yes, sir.

Q. And that simply meant that a statement, a so-called Bordereau, were furnished the American Fidelity, setting forth the reinsurance arrangements?

A. Yes, sir.

Q. And that, of course, involved knowledge on the part of American Fidelity and Casualty Company that they were reinsuring that business in that amount?

A. Yes, sir.

Q. Now, distinguish for me, if you will, the flat cancellation and rewrite technique insofar as notice to the company assuming the liability is concerned.

A. Well, are you talking, Mr. Garrison, of flat

(Testimony of Ralph L. Smead.)

cancellation or the Public Service rewrite? Well, those weren't flat cancellations.

Q. Well, they were cancelled?

A. Cancelled by notice, yes, sir. [341]

Q. Yes, sir.

A. Under the Bordereau basis, it is an agreement between the two companies, where one company assumes the liability of the other through an insurance reinsurance treaty or agreement, and they agree to take over the liability as set forth by the Bordereau.

Under the cancellation and rewrite it is handled more or less as new business and new individual policies written on each risk.

Q. So that if Mr. Lotz, as he did have, had authority to accept new business, that business could be accepted without any notice to the Mid-States Insurance Company at all?

A. Well, of course we had to give them our daily reports.

Q. Well, up until the time they received the daily reports?

A. That is true, yes, sir.

Q. And as a matter of fact in this case you didn't give the Mid-States Insurance Company any notice of this business excepting through the daily reports?

A. That is true.

Q. No letter and no telegram was sent to them giving them this notice?

A. Not to my knowledge.

Q. The first thing, so far as you know, they knew anything about it was when they got this

(Testimony of Ralph L. Smead.)

bunch of six or eight hundred dailies that Mr. Hatfield testified to? [342]

A. Well, we sent the dailies through on that as they were completed, whatever bunches that might have been.

Q. In other words, that work was being done, as you say, over at Public Service office and then they delivered it to you and then they were mailed on?

A. Yes, sir.

Q. And it is your testimony, I believe, in the previous case, that you mailed those to Los Angeles and then they were ultimately sent on to Chicago?

A. Well, I believe we did send those to Los Angeles, which was our normal procedure.

Q. Well, now, as I understand your testimony, Mr. Smead, when you went to New York to this meeting you owed approximately \$280,000 to different companies?

A. Yes, sir, approximately that amount.

Q. And you only had \$75,000 accounts receivable? A. Yes, sir.

Q. And that was all discussed in this room, in Mr. Hart's office? A. Yes, sir.

Q. I believe you said that a plan was developed there to get another company to take business and use those premiums to pay off these balances?

A. That was the Mid-States Insurance Company, yes, sir.

Q. And of this \$280,000 that was owed, \$240,000 of it was [343] owed to Mr. Hart?

A. Yes, sir.

(Testimony of Ralph L. Smead.)

Q. Thirty was owed to Mid-States?

A. Those are approximate figures.

Q. I understand, round figures, and ten thousand to miscellaneous companies?

A. Yes, sir.

Q. And then pursuant to that Mr. Lotz went out to Chicago to discuss with them regarding more business, is that what he did?

A. That was his purpose of going to Chicago, yes, sir.

Q. He already had a contract with Mid-States?

A. Yes, sir.

Q. But what had you, what had been the relationship with Mid-States just prior to this time?

A. Well, we had been producing very little business for that company.

Q. You had switched your——

A. Account to American Plan.

Q. ——to American Fidelity, not entirely, I take it?

A. Not entirely, no, sir.

Q. But for practical purposes?

A. Yes, sir.

Q. Well, it was necessary, was it, that the relationship be re-established in order that they would accept an increased volume? [344]

A. I believe that was it, and also Mr. Lotz thought he could get, possibly, a better contract with Mid-States.

Q. And the meetings adjourned on that note, did they, that that was the way in which the account of American Fidelity was to be paid?

(Testimony of Ralph L. Smead.)

A. Yes, sir.

Mr. Bronson: That's a conclusion of the witness, what he knows.

Mr. Garrison: Q. Well, now, let us see what actually happened, Mr. Smead, when you got back. Do you know, after your return, when you received a call from Mr. Hart or a teletype from Mr. Hart regarding collection?

A. After my return?

Q. Yes, sir.

A. I think it was the first day I was back.

Q. How did you receive that?

A. I think—well, I am sure I had both teletype and telephone conversations with Mr. Hart's office.

Q. I am going to show you a copy of the teletype, and it will appear on page 4, the middle of the page, and ask if you recall that teletype as being one you sent to Mr. Hart?

A. Which one is that?

Q. The one in the middle of the page.

A. August 15. Yes, sir.

Q. Yes, that teletype reads: [345]

“Mark Hart, August 15.”

When had you returned from New York?

A. I believe I arrived in Oakland on the 14th.

Q. “Mark Hart, August 15, '51.

“Cannot Give You Decent Deposit Until Thursday A.M. Working To Collect All I Possibly Can And Will Make Daily Deposits To A F And C Account Is This Satisfactory. Will Wait Reply
Ralph Smead”

(Testimony of Ralph L. Smead.)

Was that sent in response to a telephone call?

A. I am not positive, no.

Mr. Bronson: Whether it was or not, can't we have just a moment so we are together on this?

Mr. Garrison: Q. And did you receive numerous and frequent teletypes from him thereafter regarding collections and deposits?

A. From his office, yes, sir.

Q. And did these teletype messages, and phone calls occur almost daily? A. Yes, sir.

Q. Calling your attention to page 6, I ask you if you sent a teletype dated 8-30 to Mr. Mark Hart, reading:

"Have You Received Deposit Slip Covering Commission Check In The Amount Of \$4304.30 From Central Bank And Dated 8-14." [346]

"Answer: Yes We Have."

Did you see that one?

A. Yes, sir, I am reading it.

Q. Did you send that teletype?

A. Yes, sir.

Q. And following that there appears to be a teletype to you reading:

"What About \$30,000 Deposited 8-29

Min Okay

Min"

Then it says:

"Hope To Have Clearance On That For Deposit Your Account This Afternoon Or Tomorrow. Will Advise."

A. Yes, sir.

(Testimony of Ralph L. Smead.)

Q. Were those teletypes sent on August 30?

A. Yes, sir.

Mr. Schimberg: That is the 29th, isn't it?

Mr. Garrison: No, that is the date of the deposit, the day before.

Mr. Schimberg: I beg your pardon.

Mr. Garrison: Q. Following there is a teletype message reading:

"How About Funds Of \$1450. Which You Received Last Friday. Also Has Check Of \$30,000 Actually Been Deposited At Bank AFC Account."

Was that teletype sent to you?

A. Yes, sir.

Q. And did you answer that teletype?

A. Yes, sir.

Q. And will you read the answer?

A. "Answer To Both Questions Checks Are All Payable To Mid-States Insurance Company Awaiting Authorization Required To Deposit We Are Advised By That Company That Authorization Has Been Forwarded To Us That Is The Only Hold Up But Has Been Definitely Cleared After Your Telephone Conversation Yesterday With Smith Everything Is Much Better"

Q. Now, did you talk to Mr. Hart about his telephone call to Mr. Smith?

A. I don't recall it.

Q. Now, what checks are you talking about here made payable to Mid-States?

A. Public Service.

Q. By the way, I believe there was a change in

(Testimony of Ralph L. Smead.)

the method of drafting those checks, wasn't there, after the first one was drawn?

A. By Public Service?

Q. Yes.

A. I don't recall whether it was after the first one or not. I don't believe it was the first check, but I recall that there [348] was a large check for some \$67,000, I believe it was, that was drawn payable to Joe Lotz. The check was deposited by Mr. Lotz and a stop-payment was issued by Public Service. The check was re-issued payable to Mid-States Insurance Company.

Q. And were all the checks thereafter made payable to Mid-States Insurance Company?

A. Yes, sir.

Q. Those are the checks that were endorsed Joe Lotz and deposited that were involved in the litigation against the bank?

A. Yes, sir.

Q. Now, you say in your teletype here in response to the previous one: "Answer To Both Questions", that is the "both questions" appearing in the teletype just above. Would you read the following message that appears on that page?

A. "Understood Public Service Checks Were To Be Made Payable To Lotz. Has This Procedure Been Changed. First Check Payable To Mid-States However This Has Been Changed And If We Do Not Receive Authorization Right Away From Them We Can Have Re-Issued."

Q. Now, what checks were you talking about there?

A. Public Service.

(Testimony of Ralph L. Smead.)

Q. And who was that teletype from?

A. Well, this is from the American Plan office in New York.

Q. Who did, you had the conversation as initiated with Mark [349] Hart, wasn't it?

A. Yes, sir, it appears to be.

Q. He started the teletype exchange on the 30th of August? A. Yes, sir.

Q. And this is part of that series of exchanges?

A. Apparently, it appears to be the same date.

Q. Yes. Do you know how Mr. Hart understood that the Public Service checks were to be made payable to Mr. Lotz, had you told him that?

A. I can't recall it definitely.

Q. At any rate the first one was made payable to Lotz, and then Public Service changed their mind and made it payable to Mid-States?

A. I don't recall whether the first one was made payable to Lotz or not.

Q. Well, I mean the one, larger one.

A. I definitely recall that.

Q. I call your attention to the next teletype which appears the following day, August 30, and ask if you received the one appearing at the top of the page for that date?

A. That is August 31, is it, Mr. Garrison?

Q. August 31. A. Yes, sir.

Q. It reads: "Has Check For \$30,000 Been Deposited In AFC Account As Yet." [350]

What check was that?

A. Well, during the telephone conversations,

(Testimony of Ralph L. Smead.)

during this immediate period I had advised Mr. Hart that we were expecting approximately that amount from Public Service and as soon as we had received it, we would make a payment to him.

Q. Then in the next message it says that you were out and cannot be reached. I won't read this, the intermediate messages, Mr. Bronson, if it is all right.

And then on the same date, American Plan, 8-31, to, apparently your office: "Have You Heard From Mr. Lotz Or Mr. Smead Yet"

And your office replies:

"We Are Try To Get In Touch With Them Now Will Advise You Immediately"

And then the New York Party says:

"Too Late But Please Have Them Call Anyway"
You recall those teletypes?

A. I don't believe that I was in the office at that time, but I have read those teletypes.

Q. Did you see them after you came back to the office?
A. Yes, sir.

Q. Then on page 8 I notice a teletype from you to Mark Hart dated September 4:

"Deposited \$6480. Account Of American Fidelity And Casualty Co This Date." [351]

Did you send that one?
A. Yes, sir.

Q. Was it your practice to report to Mr. Hart every deposit made?

A. We were required to do that, yes, sir.

Q. And where had this \$6480.00 come from?

(Testimony of Ralph L. Smead.)

Mr. Bronson: Is that a teletype that you have?

Mr. Garrison: Yes, it is. You have the original.

Mr. Bronson: I have the original? I notice it isn't the same type as teletype.

Mr. Garrison: No, I believe this is the one you have the original of or——

A. I do not know, Mr. Garrison. Of course, the money was——

Mr. Garrison: Q. Excuse me.

A. (Continuing) ——probably transferred from Mr. Lotz' trustee account, but where the deposit originated from, I don't know.

Q. If you don't know, just say so. Were you actually depositing from his trustee account funds that were received as premiums from other companies besides Public Service? A. Yes, sir.

Q. Is it a fact that you were depositing all income from the Lotz agency during this period to the American Fidelity and Casualty Company?

Mr. Bronson: That is a leading question. [352]

Mr. Schimberg: Adverse witness.

Mr. Bronson: I don't think he is an adverse witness.

Mr. Schimberg: Called as an adverse witness.

The Court: If he knows he may answer.

Mr. Bronson: Do they have the privilege of taking the witness and directing leading questions to him?

The Court: Leading questions are illegal under any circumstances.

Mr. Garrison: I assumed, this party being an

(Testimony of Ralph L. Smead.)

adverse party, a party defendant to the case, that I was permitted to cross examine him and I be permitted to indicate my questions.

The Court: Proceed.

Mr. Garrison: Q. Is it a fact that all funds received by Lotz during this period in his trustee account were paid in the American Fidelity and Casualty account?

Mr. Bronson: Same objection.

The Court: Overruled. If he knows he may answer.

A. I know that most all of the funds that were received by Lotz during that time were paid to the American Fidelity and Casualty Company. However, not the entire amount of the funds were.

Q. I see. Calling your attention to the teletype appearing on page 9, in the middle of the page, reading:

"Tomorrow Is Deadline With \$190,000 Unpaid"

The answer: [353]

"Be Home At Four O'clock Your Time"

You recall that teletype?

A. What is the date of that?

Q. Well, it is a part of a series.

A. 9-14?

Q. Begins at the top of the page. This is the third message—fourth message down. You see it here?

A. I was trying to.

The Court: What is the date?

The Witness: Appears to be dated American Plan NY 9-14.

(Testimony of Ralph L. Smead.)

Q. Reads to Ralph Smead from Mark Hart:
 "What Is Amount Deposit Today."

"Minute OK Will Not Make Deposit Until
 After Three Oclock Today Have Approx \$5000
 Regular And Will Make Transfer From Other
 Funds"

A. Yes, sir, I recall this message.

Q. What other funds did you mean when you
 used that expression?

A. The "regular" meant funds received for reg-
 ular American Fidelity and Casualty premiums.
 Other funds would be from other companies.

Q. Public Service or anyone?

A. Public Service or anyone, yes, sir.

Q. And then the next teletype on the same series
 reads:

"Tomorrow Is Deadline With \$190,000"

This is the September 14th. I understood you to
 say that [354] you undertook to pay American Fi-
 delity off entirely by the 15th of September, is that
 right?

A. That's right, yes, sir.

Q. And this teletype refers to that deadline?

A. Yes, sir.

Q. And then you recall that teletype coming in?

A. Yes, sir.

Q. Now, the next one reads:

"American Plan New York"

This is apparently a call on the 17th from you to
 Mark Hart.

"Mr. Hart Will Be Back In About An Hour.
 May I Take A Message"

(Testimony of Ralph L. Smead.)

"Tell Him I Have Deposited \$8303.25 In The AFC Account Today And That Mr. Lotz Did Not Receive His Telegram Of Saturday Until Today Mr. Lotz Is Out Of Town See If There Is Any Message From Mr. Hart When He Gets Back"

And on the 17th, American Plan, New York, to Mr. Lotz—no, rather, reverse that, Mr. Lotz to American Plan:

"Is Mark Hart In, Please

"Min Please

"Yes Go Ahead"

And the message is:

"Mark You Mentioned The Other Day That You Were [355] Short A Couple Deposit Slips Which Ones Go Ahead"

And the reply comes back:

"One For \$15,000 One For \$7,867.35 And Of Course Todays"

Then, apparently, you replied:

"I Suppose You Received The One For Saturdays Deposit"

Mr. Bronson: Todays, isn't it?

Mr. Garrison: "I Suppose You Received The One For Saturdays Deposit", today, yes, you are right.

"Is This The One For \$60,800."

Apparently there is a typographical change there and the 8 has been changed, substituted 5.

"Go ahead.

"OK Received. Guess That Will Do It Will Send Others Out Right Away"

(Testimony of Ralph L. Smead.)

Q. Was the amount \$60,800, or was it some other amount in the original teletype?

A. Well, we made a large deposit to their account at approximately this time and it could be \$60,000 and some odd dollars.

Q. In other words, your best judgment would be the figure should be \$60,000 rather than \$60,800?

A. Well, I can't say that that figure should be that, but I do recall we did make a large deposit.

Q. Approximately \$60,000?

A. Sixty thousand dollars and that could well be intended to be that.

Q. Where had that money come from?

A. That money had come from Public Service.

Q. Now, then, on page 10 it says:

"American Plan: August commissions credited to your account \$6,692.00 making net balance due us through August 31st \$125,138.94, inclusive, of our \$50,000 loan, but not including expenses related to collection. We are considerably disturbed over your failure to live up to agreement to liquidate our balances by September 15th, particularly since American Fidelity auditors will be in October 1st for regular annual examination of our affairs as previously explained, they have no knowledge of this entire situation and we actually loaned you \$50,000 to keep this matter from them so as to avoid drastic action on their part. As you can perceive, I am unable to hold this after September 30th and therefore, urgently request that you take every necessary step to liquidate this balance, if possible, within

(Testimony of Ralph L. Smead.)

next five days. We have acted 100% in good faith and expect you to do likewise. (This message dictated go operator and signed by Mark M. Hart.) Please reply [357] immediately."

You recall that message coming in?

A. Yes, sir.

Q. On page 11, dated September 21, approximately 12:30 p.m.

"American Plan Operator: American Plan, New York. Go ahead please.

"Joe Lotz Operator: To Mark Hart from Joe Lotz and Ralph Smead. In reply to your teletype of this morning. Will have approximate deposit Monday of \$30,000. Working on loan for any balance. Will telephone you Monday morning. End or go ahead." Did you send that teletype?

A. Yes, sir.

Q. Now, is that the \$30,000 that was referred to a few days before in the teletype messages regarding a collection in that amount?

A. I don't believe it was, no, sir.

Q. Is this a second \$30,000 collection?

A. Well, actually, I don't believe we made, Mr. Garrison, these specific collections. But I would say this is definitely a second——

Q. Deposit?

A. Deposit that we were working on.

Q. In other words, you accumulated funds in the trustee account, did you, and then paid them into the A.F.C. account? [358] A. Yes, sir.

Q. Well, now, in this period of July, August

(Testimony of Ralph L. Smead.)

and September, did you pay Mid-States any money at all?

A. July and August and September?

Q. Yes.

A. I believe we made a small payment to Mid-States.

Q. \$2,800?

A. I believe that is the approximate amount, yes, sir.

Q. And that is all you paid Mid-States Insurance Company in those three months?

Mr. Bronson: Well, this is—I again object. I don't concede that this is an adverse witness at all, Your Honor, again having Mr. Garrison's testimony.

Mr. Garrison: This gentleman is a defendant in this case, if Your Honor please, and I have called him as such defendant and I am cross examining him and propose to follow the same procedure as you might cross examine any adverse witness.

The Court: Proceed.

Mr. Garrison: I have the rule, Federal rule here, Mr. Bronson, if you would like to read it, Mr. Schimberg has just advised me, and I will show it to you.

Mr. Bronson: I think counsel's position is highly technical. I will retreat into that position, Your Honor.

The Court: One comforting thing, the jury is absent. [359]

(Testimony of Ralph L. Smead.)

Mr. Bronson: I think there is a little rebuke in that.

Mr. Garrison: Q. Now, calling your attention to the teletype that was sent September 27, and also on page 12, this is a teletype apparently from you to Mr. Hart. It says:

"Can't get phone circuit to your office. It will not be necessary for you to call Smead in Santa Monica,"——

That is referring to your brother, I take it? Do you find where I read it? A. Yes, sir.

Q. Is that your brother?

A. May I read it?

(Witness reading document.)

Yes, sir.

Q. "Fund of his are being mailed to us today. We are making drive to see how much balance can be reduced by the first. Joe is working on loan now, should have some info today. Do you have any further instructions. Ralph Smead"

"GA", that means go ahead, does it?

A. Yes, sir. [360]

"Will teletype you tomorrow to get up to date story. As frankly, am deeply concerned about the attitude that will be assumed by the company if their auditors uncover the delinquency. Relying on you to do your utmost and to keep me posted every day by teletype. Hart."

Q. Did you reply to that teletype?

A. Yes, sir.

Q. And on Page 13 there is a teletype:

(Testimony of Ralph L. Smead.)

“American Plan Operator: To Ralph Smead from Mark Hart. This is our last working day of month, must have some definite and positive information your intentions or will be obliged to take drastic steps immediately. Hope this will be unnecessary. What is the score. Go ahead.”

Do you recall receiving that one, Page 13?

A. Yes, sir.

Q. And the reply from your operator is that you are out right now, and then the American Plan operator says—maybe I'd better read this:

“Joe Lotz: I am sorry, but Mr. Smead and Mr. Lotz are out right now. Will give them the message when they return.”

And the reply comes back:

“I hink this is a stall and unless I hear [361] from Mr. Smead before tomorrow morning, will take necessary action including advices to insurance department and other local authorities, unless you can find Mr. Smead.”

Do you remember that?

A. Very definitely, yes, sir.

Q. Is that one of the teletypes you referred to when you referred to the pressure?

A. Yes, sir.

Q. Did you reply to that teletype?

A. Yes, sir, I did.

Q. Do you find it there on the same page, bottom of the page?

A. September 28, yes, sir.

Q. Would you read that?

(Testimony of Ralph L. Smead.)

A. "To Mark Hart from Ralph Smead: Mark, first, there is definitely no one stalling here. Mr. Lotz and I were at the bank working on loan when you called and it is felt that loan will be consummated shortly. Tex Smead is arriving here this afternoon via air with his money. We are trying hard to take care of you and don't think it will take much longer to clear things up. Go ahead."

Q. Mark Hart replies:

"Can appreciate you are trying, but you must [362] visualize my position. Cannot go along much further on promises of loan and of Smead paying over his money. There is still a large balance. However, we will hold off until we hear from you on Monday as to amount of deposit made. Incidentally, have you mailed deposit for \$15,955.59?"

Do you recall that?

A. Yes, sir.

Q. That teletype. Did you receive a teletype on the 16th of October from Mr. Hart appearing on Page 14 reading:

"Company auditors questioning balance. Imperative that you advise immediately."

A. Yes, sir.

Q. You apparently were out and said you would be back.

Now, on the 18th of October, I see a teletype, on Page 15, at the top of the page from John Ferguson. Do you know who he was—is?

A. Not of my own personal knowledge, no, sir.

Q. This teletype says:

(Testimony of Ralph L. Smead.)

“Examining books of American Plan on behalf of American Fidelity and Casualty and note substantial balance due from your office. Must have immediate expression as to your intentions. From John Ferguson, Auditor.”

Is that the only teletype you received from him?

A. I believe it is. In fact, I believe that is the first and only time I have ever heard his name.

Q. Now, did you receive a teletype on the 19th from—I believe it was a telegram—did you receive a telegram on the 23rd from Mr. Hart regarding balance? You will see the copy of the telegram on Page 16. This telegram reads:

“Ralph Smead, care Joe Lotz, 315 - 14th Street, Oakland, California:

“Company auditors inform me of their intention to come to Oakland next week unless minimum of \$40,000 is deposited no later than Friday. Mark M. Hart.”

Did you receive that wire?

A. Yes, sir.

Q. Now, on Page 17 there is a teletype dated the 23rd of October to Ralph Smead from Mark Hart, reading:

“Company auditor awaiting reply to wire this A.M. so as to determine whether or not trip to Oakland is necessary this weekend. What can you tell me definitely.

“Mark, we have definite arrangements for loan and will also have some additional money for you. Do not see any necessity for trip by auditors. Do

(Testimony of Ralph L. Smead.)

not think their trip would bring any faster results. I feel confident that the matter will be completely [364] cleared up in a very short time, believe me we are using all our efforts on this project. So I would not advise a trip by your auditors."

This is the reply:

"Have complete confidence you and Joe, but entire situation will pass from my control to Company auditor unless substantial deposit apart from loan is made by Friday. If you can send us a good sized deposit by Friday, I may be able to talk auditor out of going to Oakland and stirring up all kinds of trouble. This matter has reached a stage where company might take drastic action and of course, I am doing everything within my power to avoid same for Joe's sake."

And your reply:

"We appreciate your part, Mark, and believe me we will do our best."

And it says:

"According to my calculations, you should be collecting about \$100,000"——

Is that the correct figure? It is typed here in?

A. I see that it is corrected.

Mr. Bronson: The correction follows it.

Mr. Garrison: Q. (Reading)

"* * * this month. Am I right. Correct [365] \$100,000."

Did you receive those teletypes?

A. Yes, sir.

Q. Now, as I understand it, Mr. Hart had in-

(Testimony of Ralph L. Smead.)

structed you not to place any more business with the American Fidelity and Casualty Company, had he not? A. Yes, sir.

Q. And when did he do that?

A. While we were in New York Mr. Hart said definitely that we couldn't continue business with him.

Q. That was in August?

A. That was August 13.

Q. You are now at the end of October?

A. Yes, sir.

Q. These collections have all been made but no business had been written for American Fidelity and Casualty during that period?

A. I would say that during the period of after August 20 there were definitely no policies written with that Company.

Q. Now, I call your attention to a teletype on Page 18, which is dated October 24, Mr. Ralph Smead from Mr. Will.

"Balance due date \$66,010.07."

Do you see that?

A. Yes, sir.

Q. And was that the balance due AFC by that time, or [366] approximately?

A. Approximately that amount, yes, sir. This was October 24. Yes, sir.

Q. So that the 240 balance you referred to as existing in August had now been reduced by this method you described to \$66,000?

A. Yes, sir.

(Testimony of Ralph L. Smead.)

Q. And then there is another reference to some detail in connection with the bookkeeping, and then:

“American Plan Operator: To Mr. Ralph Smead from Mr. Will.” is the next message following:

“Balance to date excluding today’s deposit regarding your teletype message is \$71,010.07. This, of course, includes September commission application and estimated legal and travel expenses in connection with trip to your office, but does not include return premiums since they are not properly includable.”

So that as of that date, we have approximately that amount as being agreed between you as the balance due, is that correct?

A. I don’t believe we ever agreed on the five thousand legal expenses, but the——

Q. The balance——

A. The balance of premiums is approximately right. [367]

Q. Legal and travel expense represents a charge made for Mr. Hart and Mr. Seller coming out here that time? A. Yes, sir.

The Court: We will take a recess.

(Whereupon a short recess was taken.)

(Whereupon, following the mid-morning recess, the witness Ralph L. Smead resumed the stand and testified further under direct examination by Mr. Garrison, as hereinafter indicated:)

Mr. Garrison: Q. Mr. Smead, I would like to

(Testimony of Ralph L. Smead.)

show you a series of checks which were introduced in this case marked Plaintiff's Exhibit No. 5.

Mr. Bronson: Will you tell us what it is, please?

Mr. Garrison: Sir?

Mr. Bronson: You are showing him an exhibit that is already in?

Mr. Garrison: Yes.

Mr. Bronson: Mr. McCallum's case?

Mr. Garrison: Yes.

Mr. Bronson: All right.

Mr. Garrison: Q. Ask you if you will look at those checks and see if you recognize them.

The Court: Any questions about these checks?

Mr. Bronson: No, Your Honor, they are in evidence already, Plaintiff's Exhibit 5, Mr. McCallum's case, the bank case.

Mr. Garrison: I want to ask him some questions about them when he——

Mr. Garrison: Q. You don't have to go over each one carefully, already have been identified, Mr. Smead, as being the checks that were paid by Public Service Insurance Company to the Mid-States Insurance Company on the dates they indicate?

A. There is one in here from a George R. Fulmore.

Q. Yes, with a Fulmore check added.

A. Also Jackson Motor Sales.

Q. Yes.

A. Yes, sir, I recognize——

Mr. Garrison: Incidentally, Your Honor, I no-

(Testimony of Ralph L. Smead.)

ticed that the photostat that has been introduced is a very poorly developed negative, and I am going to suggest to Counsel at the recess that we substitute—— [369]

The Court: Where was it prepared, in Chicago?

Mr. Garrison: No, I think it was photostated here.

The Court: All right.

Mr. Garrison: In California.

The Court: I think you are mistaken about that; we have very competent people here.

Mr. Garrison: Well, I am sure we have, and this apparently is the last run, and it wasn't expected to be used, apparently.

Mr. Bronson: If you want to substitute it, it is all right.

Mr. Garrison: I think after recess we can get together and put a more legible set of prints in so it will be easier for the Court to look at.

Mr. Garrison: Q. Now, then, these are the checks, Mr. Smead, that you received from the Public Service Insurance Company for the business that you have been referring to?

A. Yes, sir.

Q. And I show you also a series of checks and ask if you recognize those? A. Yes, sir.

Q. And were these checks as they appear drawn on the Lotz trustee account? A. Yes, sir.

Q. And all made payable to the American Fidelity and Casualty Company? [370]

A. Yes, sir.

(Testimony of Ralph L. Smead.)

Q. In the amounts and on the dates that appear. I will ask these be received in evidence as a group.

Mr. Bronson: May I see them, please?

Mr. Garrison: As plaintiff's exhibit next in order.

Mr. Garrison: Q. Now, what was done with the checks you received from Public Service?

A. They were deposited in Mr. Lotz' trustee account.

Q. And what was done with the money after it was deposited in the trustee account?

A. Well, some of the money was transferred to Mr. Lotz' operating account. However, I believe that the major portion of it was paid to the American Fidelity and Casualty Company.

Q. I will show you one of these checks, being Public Service Check No. 3611, and ask on what day and what month and what day you received that check and on what day of the—and what month it was deposited in the trustee account?

A. This check is dated San Francisco, California, September 14, 1951, in the amount of \$67,500.00. There is a bank endorsement of September 18, 1951.

Q. I will show you a clearer print, if you can't read it.

A. This is the check that I told you about earlier that was originally paid to Joe Lotz, General Agent, I believe, was drafted to, and the check that was payable to Mr. Lotz was issued on Friday, and on

(Testimony of Ralph L. Smead.)

the following Monday the Public [371] Service issued a stop-payment and reissued the check, and that date might be the following Monday.

Q. So that the one I just handed you is the one, this is made payable to Mid-States Insurance Company?

A. Yes, sir, that one is, but there is one, the same amount payable to Joe Lotz.

Q. That payment was stopped, was it?

A. Yes, sir, and it was drawn on a Friday, as I recall, and deposited, and I believe the next day we wrote a check to the American Fidelity and Casualty Company.

Q. I see. Is that the—did I give you this?

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 19 admitted and filed in evidence, being the checks.

(Whereupon the Group of Checks, referred to above, were admitted into evidence and marked Plaintiff's Exhibit No. 19.)

Mr. Garrison: Q. I show you a check, No. 5011, drawn on the Joe Lotz trustee account. Is that the check you just have been referring to?

A. Well, no, sir, I was referring to a check in the amount of \$67,500.00 from Public Service payable to Joe Lotz.

Q. Yes, but then previously you referred to a payment to the American Fidelity by Joe Lotz in the sum of \$60,000.00. A. Yes, sir. [372]

Q. Now, tell us what that check is?

(Testimony of Ralph L. Smead.)

A. This check is in the amount of \$60,000.00, issued 9-15-51.

Q. That's the day following the Public Service deposit? A. Yes, sir.

Q. Do you know what balance there was in the Joe Lotz trustee account when the \$67,000.00 Public Service deposit was made?

A. Well, I recall that it was very, very low, recall that it was necessary that we have the \$67,000.00 check before we could pay Russell and Bond their ten per cent fee, which I think amounted to, oh, several thousand dollars, I forget the exact amount.

Q. So that you paid Russell and Bond their fee out of the very premium monies that you received from them?

A. I believe we did, yes, sir.

Q. Now, all of this Public Service business was put on the books of the Mid-States Insurance Company, is that correct?

A. The policies were written in Mid-States Insurance Company, yes, sir.

Q. And that total represented a liability of about \$150,000?

A. Between 130 and 150 thousand.

Q. Were the other payments that were made out of the trustee account to the American Fidelity and Casualty account made shortly after you received the Public Service monies?

A. Yes, sir.

Q. And those payments were the payments that

(Testimony of Ralph L. Smead.)

were made, that [373] were referred to in these teletype messages to Mr. Hart, were they, that I read you earlier?

A. They were some of those payments, yes, sir.

Q. Now, when did you have a conversation with Mr. Hart about what you were going to do, if anything, with this balance that was remaining after these transactions had occurred on the AFC of some sixty-one or seventy thousand dollars?

A. Yes, sir, after we had exhausted, I would say, the money that we had coming in from Public Service and had exhausted all of our other receivables, practically, there was a remaining balance which I discussed with Mr. Hart about cancelling that business of the American Fidelity and Casualty Company flat and rewriting it in the Mid-States Insurance Company.

Q. In other words, you were going to cancel flat enough American Fidelity business to offset this remaining balance of sixty-one or seventy thousand dollars?

A. Well, I believe it was the original plans to only cancel American Fidelity that was effective in September of 1951, or no later than August, but in order to cancel sufficient business to total sixty some odd thousand, it was necessary to go back into July.

Q. That wasn't business you had written for American Fidelity, was it?

A. That was business we had written in American Fidelity and Casualty. [374]

(Testimony of Ralph L. Smead.)

Q. In September?

A. Well, there was some business effective in September, yes, sir—no, sir, it wasn't business effective in September, it was August.

Q. August?

A. It was July and August.

Q. Your authority to write for American Fidelity and Casualty had been cut off August 13?

A. Yes, it certainly had.

Q. So that you are talking about the business that had been written the first thirteen days of August?

A. Although we might have represented to Mid-States Insurance Company that we were writing business in September, I remember that month mentioned at that time, it could be possible that we did represent there was policies effective in September, although actually I don't believe there were any.

Q. They were actually all policies that had been written prior?

A. Yes, sir, the later policies that were written.

Q. When did you have these conversations with Mr. Hart?

A. I believe these were in October or November of '51.

Q. Start out in the early part of October?

A. I believe it was, definitely in that period.

Q. Now, do you know what the balance due Mid-States was as of this date, October 1? [375]

A. The balance due Mid-States?

(Testimony of Ralph L. Sinead.)

Q. Yes.

A. As of October 1? I believe we had about twenty some odd thousand dollars due, not including the Public Service business.

Q. The total balance due from Lotz to the Mid-States Insurance Company on October 1, do you know what that is? October 1?

A. That would include Public Service, plus their private writings. I would, as of October 1,—

Q. Would it refresh your recollection if I told you it was \$329,219.91?

A. As of October 1?

Q. Yes, sir, 1951. I don't mean the exact numbers, if you recall approximately.

A. I am trying to get the approximate amount—that is a very large sum. As of October 1, I could possibly account for two hundred thousand, or maybe a little more.

Q. Well, the figure is 329. Do you know what the balance owing American Fidelity was at that time?

Mr. Bronson: Did you hold up your hand?

Mr. Garrison: Well, the evidence will come in in due course, counsel.

Mr. Bronson: Coming in now.

Mr. Garrison: Correct, in the proper way.

The Court: They object to your testifying.

Mr. McKinnon: To distinguish from the evidence and [376] what counsel says, I find it is difficult.

The Court: Counsel's recital may go out.

Mr. Garrison: Yes, my recital may go out.

(Testimony of Ralph L. Smead.)

Q. Do you recall what the balance was due American Fidelity as of October 1?

A. I believe it would be around \$60,000.00, approximately.

Q. All right. You then discussed this flat cancellation of the American Fidelity and Casualty policies and the rewriting of them in the Mid-States? A. Yes, sir.

Q. And how was that accomplished?

A. You mean the mechanics?

Q. Yes, just tell us the mechanics of it.

A. Well, the business, as I stated, was originally written in American Fidelity and Casualty Company.

Q. Yes.

A. The policies of the American Fidelity and Casualty were cancelled by notice to the insured, with a statement that the policy was being cancelled flat and rewritten in the Mid-States Insurance Company.

We then wrote the policies in the Mid-States Insurance Company, using the same policy period, dates, and so forth, as the American Fidelity and Casualty Company.

Q. And did you cancel sufficient to wipe out the remaining balance of the American Fidelity and Casualty Company? [377]

A. Yes, sir, I think we tried to cover approximately the exact balance that we owed American Fidelity and Casualty Company.

(Testimony of Ralph L. Smead.)

Q. Now, I believe in the early stages of this plan you called Mr. Hatfield regarding it?

A. Yes, sir, I talked to him.

Q. Had a conversation with Mr. Hatfield, and what was that conversation?

A. Trying to recall whether it was accomplished by a telephone conversation, or whether it was only a telegram. The actual agreement on this rewrite was between Mr. Hatfield and Mr. Hart.

Q. But you did have some communication?

A. Yes, sir, I did have some communications. I recall the telegram definitely, telephone conversation with Mr. Hatfield, I also seem to recall that, but I am not definite. [378]

Q. You didn't, in any event, tell Mr. Hatfield anything about this campaign you had been carrying on for paying monies to American Fidelity and Casualty Company, did you? A. No, sir.

Q. You didn't tell him anything about your having paid the monies that you got from the Public Service Insurance deal to the American Fidelity and Casualty Company, did you?

A. No, sir.

Q. And you didn't tell them at that time that you had put business on their—committed them for business to the extent of \$329,000?

A. No, sir.

Q. And that you had paid the American Fidelity down from 240 to 56 thousand? A. No, sir.

Q. Had anyone from Mid-States visited your

(Testimony of Ralph L. Smead.)

office in this thirty or sixty day period when this campaign was going on?

A. You mean from the period of August 20——

Q. No, during September and October.

A. During September and October?

Q. Yes.

A. I believe that Mr. Kledzig was in our office once or twice during those months.

Q. You didn't disclose any of this to him?

A. No, sir. [379]

Q. Referring to this Public Service Business, did the pressure that Mr. Hart put on you, exemplified by these teletypes, influence you in taking that business and making that deal?

A. Yes, sir, very definitely.

Q. And how did that come about?

A. Well, that was the only possible way with the use of those fronts that we could—that was the only possible way that we could hope to liquidate their balance by the agreed date of September 15. We had to have a large block of business. The normal agency production certainly couldn't accomplish it within that time, or even within 90 days.

Q. Well, all right. Now, going on to this American Fidelity rewrite, do you know what your accounts receivable were as of that time?

A. As of the date we wrote——?

Q. October 1.

A. No, I don't, Mr. Garrison.

Q. Very well, we will establish that by other means.

(Testimony of Ralph L. Smead.)

How long a time did it take you to complete this transference of the liabilities from the American Fidelity over to the Mid-States Insurance Company?

A. Approximately two weeks, I would say; within two weeks.

Q. Were you in frequent communication with Mr. Hart during this time? [380]

A. Yes, sir.

Q. Did you have any pressure from him regarding completing that transaction?

A. I had teletype messages requesting amounts of cancellation tickets that had been completed from time to time.

Q. I would like to call your attention to a teletype message starting on Page 20, appearing on Page 20—or rather 19. Let us go back to 19.

At the top of the page there appears a teletype from American Plan, New York, Mark Hart—this is to Mark Hart from Ralph Smead, and this is dated October 31.

“Have telegram from Gerald Hatfield as follows: Are we to assume liability on policies rewritten from American Fidelity as of original effective date of American Fidelity policy. If so, what is earliest effective date also cannot allow fifteen per cent advance commission of this rewrite business. Please wire reply.”

Did you send that wire to Mr. Hart?

A. Well, this was a teletype message.

(Testimony of Ralph L. Smead.)

Q. Teletype, yes, excuse me. And received the reply:

"We were just calling you when your call came in."

And then he gives you a message, which is not particularly important. [381]

And then farther down, Mr. Hart to Mr. Ralph Smead:

"No wire from Hatfield. Did you wire him yesterday. Go ahead."

Answer:

"Yes, and I definitely asked him to wire you today."

"Okay, will wait wire, but if we can't clear this matter up by Friday, I will be in Oakland on Monday with Ferguson."

That is the same person, I take it, referred to in the earlier teletype? A. Apparently, yes.

Q. And did that have to do with the clearing of the rewrite with Mr. Hatfield working out the agreement and getting his consent to it?

A. Yes, sir.

Q. Calling your attention to a teletype of November 1 appearing on Page 20, the last one, this is from Hart to Smead, or from American Plan, New York, for Ralph Smead.

"Is Ralph Smead there?"

"I am sorry, but he just left to go to lunch. We expect him to return in about an hour."

"Tell Mr. Smead we have just received green light from Hatfield and he should start to process

(Testimony of Ralph L. Smead.)

any policy on which losses have not been recorded.
[382] Will contact Smead tomorrow with complete instructions. In interim tell him we would like to cancel seventy thousand of premium in order to clear entire matter. Believe the more cancelled the more advantageous to your office."

Now, that is the seventy thousand balance due American Fidelity?

A. That \$70,000 apparently included their estimated legal and travel expenses.

Q. That's the item that you never did agree to.

Mr. Garrison: Bear with me just one second, Your Honor.

Mr. Garrison: Q. Calling your attention to the teletype appearing on Page 23, this is apparently a continuation of one started on the previous page, dated November 8, and at about the middle of the page, New York says:

"That is right. So we will use ten or five day notices as cases might be and also have them stand losses on any rewrites."

"Just be sure to get us off legally and as fast as is humanly possible."

You recall that teletype from Mr. Hart?

A. I haven't——

Q. That is appearing in the middle of the page, 23, just above the paragraph break.

A. Yes. [383]

Q. You recall that?

A. Yes, sir, I recall it.

Q. Do you know what the necessity was for get-

(Testimony of Ralph L. Smead.)

ting that job completed as fast as humanly possible?

A. To complete the liquidation of American Plan's balances.

Q. And did you complete it?

A. Yes, sir.

Q. And thereafter American Plan had no balance due whatever?

A. Yes, sir, that is true.

Q. As a matter of fact, you did the job so well American Plan ended up owing Mr. Lotz money, did it not?

A. Well, I don't know whether it was as a result of this work. There would be normal cancellations that would produce credits to Mr. Lotz from time to time, but I am sure we cancelled sufficient business to liquidate his balance.

Q. And in the exact amount that Mr.—That Mr. Hart, the American Plan Corporation balance went down, Mid-States balance went up, didn't it?

A. Yes, sir.

Q. And the only prospect that you had for ultimately paying Mid-States balances at that time was out of your accounts receivable?

A. Would you mind——

Q. The only funds from which you had to pay Mid-States balance of 320 odd thousand at that October 1 date was out of [384] your accounts receivable?

A. Out of any accounts receivable, I don't know whose they were.

(Testimony of Ralph L. Smead.)

Q. Out of accounts receivable, that was the only source.

You had some correspondence and telephone calls with Mr. Hatfield shortly after this bunch of Public Service dailies arrived in his office, didn't you?

A. Yes, sir, there was correspondence on it.

Q. And shortly after that correspondence he came to Oakland, Mr. Hatfield?

A. I don't believe it was shortly after.

Q. Well, within the same month, the end of November?

A. I think the Public Service correspondence you mentioned was before November.

Q. Yes, but I mean after the correspondence you had with Mr. Hatfield and Mr. Lotz, Mr. Hatfield and Mr. Czar came to Oakland?

A. They came to Oakland in November, I believe.

Q. Latter part of November?

A. Yes, sir.

Q. And you met with them on a series of occasions?

A. Yes, sir.

Q. Do you recall when it was you first met them—with them?

A. The exact date I don't, no, sir.

Q. Sometime at the end of November? [385]

A. It was shortly after their arrival here.

Q. Do you know where you first saw them?

A. Well, I have met with them in several places, in the hotel at which they were staying, in Mr.

(Testimony of Ralph L. Smead.)

Lotz' office, Mr. Mead's office, but the first place of meeting I don't recall.

Q. You are not sure?

A. No, sir, I am not sure.

Q. And Mr. Mead was at that time representing Mr. Lotz, was he, as his attorney?

A. Yes, sir.

Q. Did he also represent you?

A. No, sir.

Q. He was attorney for the Lotz general agency?

A. Yes, sir.

Q. As such. Had he been collaborating with you on these transactions during the previous period?

A. I don't know, I don't—

Q. At any rate, he was present in the discussions with Mr. Hatfield and Mr. Czar and yourself?

A. He was present at times, yes, sir, but not on all occasions.

Q. There has been introduced here in evidence a letter, Plaintiff's Exhibit No. 6, dated November 27, signed by Joseph Peter Lotz, witnessed by William B. Mead and Ralph L. Smead. [386] Do you remember when that letter was—when you first saw that letter, if you have ever seen it?

The Court: November '51, wasn't it?

The Witness: The letter is dated November 27, 1951.

The Court: All right.

The Witness: I witnessed Mr. Lotz' signing of this document. However, at the time it had been

(Testimony of Ralph L. Smead.)

completed and I had not been present at the time it was drafted.

Q. Where did you witness his signature?

A. I first saw that letter in Mr. Lotz' office. I don't recall whether he signed it in his office or in Mr. Mead's office.

Q. Who showed you the letter?

A. Mr. Lotz.

Q. Who was present at that time?

A. I think only Mr. Lotz and myself.

Mr. Garrison: This is the letter, Your Honor, that reads—it is addressed to Gerald A. Hatfield.

“Dear Mr. Hatfield:

“I wish at this time, of my own free will and accord, to relate to you the facts and circumstances surrounding the financial difficulties in which I find myself today, and to explain to you in detail, to the best of my knowledge, how it happened.”

I won't read it all just now, just give you that much to [387] identify it.

And did he tell you who prepared the letter?

A. He told me that the letter was prepared—this was on a Monday morning, very early. I recall that I came to the office after a telephone call at my home from Mr. Lotz quite early on Monday morning, and he told me that he had been at the Leamington Hotel the day before, Sunday, most of the day and quite late during the night, and that they had agreed that, he had agreed with the officials of Mid-States——

Q. Meaning Mr. Hatfield?

(Testimony of Ralph L. Smead.)

A. I don't recall whether the name was mentioned or not, Mr. Garrison.

Q. Did you know Mr. Hatfield and Mr. Czar were out here then?

A. They were here at the time.

Q. Did you know it? A. Yes, sir.

Q. And Mr. Lotz had apparently been with them on the day before? A. Yes, sir.

Q. And what did you do with the letter when he handed it to you at the office?

A. I read the letter and also I believe there were other documents with it, and later on he signed it, I witnessed it.

Q. Well, later on you signed it at some other place, didn't [388] you?

A. I am not positive, Mr. Garrison, where he signed it.

Q. Did you talk with Mr. Mead at all about it at the time it was being signed? I notice his name appears on it.

A. I don't recall any specific discussions on it.

Q. Don't you remember Mr. Mead being present when you signed it, or your being present when he signed it?

A. If I could recall where it was signed—I can't—not clear exactly what the circumstances were.

Q. That is all right. If you don't recall, just say so.

Did the letter and its contents agree with the facts as you knew them at that time?

A. Well, I'm not too familiar with the words.

(Testimony of Ralph L. Smead.)

Mr. Bronson: Expect him to memorize every line?

Mr. Garrison: I mean at the time you signed, did you feel it reflected the facts as you knew them?

A. I am not positive.

Q. Now, then, what happened in the period at which time Mr. Hatfield was out here next in connection with your meetings with him?

A. Next—the next occurrence?

Q. Yes.

A. Well, I recall the execution of the—negotiation of some of these documents. I knew that, what the plan was, but what the order of events that happened, I wouldn't say. [389]

Q. That is the plan that is referred to in this letter that I just mentioned to His Honor?

A. Yes, sir.

Q. And your conversations, I take it, had to do with the plan of rehabilitating the agency at that time?

A. Yes, sir.

Q. Do you remember now after that, while that was going on, in the forepart of December—I think it was December 4—Mr. Hatfield and Mr. Lotz returned from San Francisco where Mr. Hatfield had had an appointment with the Insurance Commissioner, and having a conversation with both of them?

A. I do, yes, sir.

Q. And was that about December 4 to your recollection?

A. I believe it was, yes, sir.

Q. And where did you see them on that day?

(Testimony of Ralph L. Smead.)

A. Well, they came back to Mr. Lotz' office. Mr. Hatfield said that he had a conversation with Joe on his way to or from San Francisco, I don't recall which, and that Joe had told him several things about the knowledge of American Fidelity and Casualty and American Plan in the status of Lotz liquidating their accounts, and he talked about their conversation and he asked me what I knew about it.

Q. What did you tell him?

A. I told him that I was familiar with the occurrences.

Q. Did you explain what those occurrences were?

A. We had a discussion generally what took place, yes.

Q. Just the three of you?

A. I believe it was only the three of us.

Q. And did you tell them substantially what you have told His Honor here this morning about those transactions?

A. Well, I don't know whether it was as detailed or entirely that, but——

Q. Substantially?

A. But we did talk about what happened, yes, sir.

Q. Substantially the same as you told us today?

Mr. McKinnon: Well, if the Court please, there is no answer to that. Another instance of testimony from Counsel instead of the witness. Does the record show any answer to that, please?

The Court: There is no answer as yet.

Mr. McKinnon: All right.

(Testimony of Ralph L. Smead.)

The Witness: Well, as I say, we did definitely discuss the things that took place, what had happened on the rewriting of the Public Service business and the plans that had been entered into. Now this—I think we actually had two or possibly three conversations the same day, or the following day, covering the same subject.

Mr. Garrison: Q. In other words——

A. Of course we talked about different phases of it at the different times. [391]

Q. What did Mr. Hatfield say?

A. Well, Mr. Hatfield said that certainly the information or discussion put a new light on his problems, that he would like to have a statement, and said that he was going to contact Mr. Titus and advise him of what had happened and await his instructions.

Q. Did he make any request of you?

A. He requested that—complete a statement for him giving him some details in writing.

Q. Did you do that? A. Yes, sir.

Q. And I show you Plaintiff's Exhibit 11, which appears to be a ten page handwritten statement, and ask you if that is the statement you wrote out at that time?

A. Are we still talking about December 4, Mr. Garrison?

Q. Well, whatever date it was.

A. Which I believe was completed on December 5, at night, and possibly the 6th.

This statement was given by me; yes, sir.

(Testimony of Ralph L. Smead.)

Q. Now, that is the statement that you prepared at Mr. Hatfield's request? A. Yes, sir.

Mr. Garrison: Your Honor will stop me whenever the time is ready.

The Court: Take a recess.

(Whereupon an adjournment was taken until the hour of 2:00 o'clock p.m., this date.) [392]

Mr. Garrison: Mr. Smead, will you come forward, please?

RALPH L. SMEAD

one of the defendants herein, recalled as an adverse witness on behalf of the plaintiff, under Rule 43(b) of the Federal Rules of Civil Procedure, having been previously sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as hereinafter indicated:

Direct Examination—(Continued)

Mr. Garrison: Will you read the last question, please?

(Last question and answer read by the Reporter.)

Mr. Garrison: Q. Where were you when you wrote this statement out?

A. In Mr. Lotz' office.

Q. What floor? A. First floor.

Q. And it took you several hours, I believe, you said to write it?

A. I think we worked on it several hours, yes, sir.

(Testimony of Ralph L. Smead.)

Q. And you finished it sometime after midnight?

A. Yes, I believe it was finished after midnight, I am sure it was. [393]

Q. That would be on the 6th of December?

A. Yes, the same day the statement is dated.

Q. What did you do with it after it was finished?

A. I gave it to Mr. Hatfield.

Q. That same—at that same time?

A. Yes, sir.

Q. And when did you next see it in connection with Mr. Hatfield and in any other person?

A. Well, it would be the night of the 6th, I believe it was, in Mr. Mead's office.

Q. Who was present?

A. Mr. Titus, Mr. Hatfield, Mr. Mead, Mr. Joe and Jack Lotz.

Q. Jack Lotz being whom?

A. Mr. Joe Lotz' son.

And I believe there was an attorney with Mr. Titus and Mr. Hatfield at the time. I don't recall his name.

Q. One from Chicago, Mr. Czar?

A. No, I don't believe it was Mr. Czar. I think it was a local attorney.

Q. And what was said pertaining to this document by any of the parties, and what did they say?

A. Well, we talked about the statement in general. We talked about, I believe, some teletype messages that were there—that we had there that night.

Q. From whom? [394]

(Testimony of Ralph L. Smead.)

A. From the American Plan, between the American Plan and Mr. Lotz' office.

Q. In connection with some of the transactions that were referred to in the document?

A. As I recall that was time, yes, sir.

Q. Well, what did any of the parties say, if you can remember, the substance?

A. Well, I recall the conversation, Mr. Garrison——

Q. Well——

A. Of course, everybody talked. I believe one of the parties read the statement to the group, and that just about covers it.

Q. And was the document signed there that night?

A. It was signed that night, yes, sir.

Q. By yourself? A. Yes, sir.

Q. And whom else?

A. I believe Mr. Lotz also signed the statement.

Q. Was the notarial acknowledgment attached at the same time? A. Yes, sir.

Q. By Mr. Mead? A. Yes, sir.

Q. And how long did that meeting last?

A. M-m, I would say approximately one hour. I am not certain.

Q. And that was at what time? [395]

A. That was in the evening after—I think after eight o'clock.

Q. Now, referring to Plaintiff's Exhibit 13, which is a statement in green ink on yellow legal-

(Testimony of Ralph L. Smead.)

sized paper, dated 12-8-51, will you tell me what you know about that document?

A. I recall—without reading the entire thing—I recall writing this statement. I have to read to be familiar with the details.

Q. Can you identify that document, Mr. Smead?

A. Yes, sir.

Q. What is it?

A. It is a statement concerning the transaction involving the rewrite of the Public Service business into the Mid-States Insurance Company.

Q. When was that written?

A. This is dated the 8th, 1951. [396]

Q. And do you know who wrote it?

A. It is in my handwriting. I wrote it.

Q. Where was it written?

A. I don't know where that was written.

Mr. Bronson: Do you have copies of that, Mr. Garrison? We were never given that under our order, saw it for the first time in this proceeding. Probably an accident.

Mr. Garrison: Is that so?

Mr. Bronson: That is true.

Mr. Garrison: This was an exhibit in the bank case.

Mr. McKinnon: We weren't in the bank case, as pointed out this morning, not a party. I hasten to say I thought it was an accident. Merely inquired if you had copies.

Mr. Garrison: I assumed you had seen all the exhibits in the bank case.

(Testimony of Ralph L. Smead.)

Mr. McKinnon: No, we haven't.

Mr. Garrison: Q. However, can you identify any of the circumstances surrounding the preparation of this statement?

A. I can't recall where that statement was written.

Q. If you can't, it is perfectly all right. Just say so.

A. I certainly can identify the statement.

Q. I notice it is signed by Joe Lotz. Was that signature attached in your presence, do you recall?

A. I don't recall whether it was or not.

Q. I show you another statement, Plaintiff's Exhibit 12, and [397] ask you if you can identify that? A. Yes, sir.

Q. And when was that—tell me first what is that.

A. This is a statement dated December 7, 1951, and covering an additional fact that had come to my mind after the statement of December 6.

Q. Where was it prepared?

A. I believe this was prepared on the first floor of Mr. Lotz' office at 315 Fourteenth Street in Oakland.

Q. And was that the next day following the preparation of this Plaintiff's Exhibit 11, the ten-page statement?

A. I believe it was. It is dated the following day.

Q. Who was present?

A. I believe Mr. Titus and myself, and I don't know whether Mr. Lotz was there or not.

(Testimony of Ralph L. Smead.)

Mr. Garrison: I will read this statement, if the Court please.

"Since making my statement of December 6, 1951, a few additional items have come to my attention which I think I should state:

"1. While in New York in Mr. Hart's office Joe mentioned that he wanted to see Dick Cass and Hart said several times for Joe not to see Cass as he was afraid Cass might be friendly with someone at Mid-States and tell them what we intended to do. [398] Joe promised him he would not see Cass.

"During a telephone conversation with Mr. Hart in November after approx. \$60,000 premium volume of AFC policies had been cancelled and rewritten in Mid-States Insurance Co., Mr. Hart asked me to destroy any teletype messages that were sent during the course of liquidation that might be harmful to him."

Mr. Bronson: I am sure you read that before.

Mr. Garrison: I am not sure.

Q. Did you destroy any teletype messages in Mr. Lotz' office? A. Yes, sir.

Q. After the telephone call from Mr. Hart?

A. Yes, sir.

Q. You recall when it was you received that call from him?

A. It was in November of 1951.

Q. 1951? Now, I will show you another statement which was introduced in the bank case as Plaintiff's Exhibit 4, and ask if you can identify that. Can you tell us what that is?

(Testimony of Ralph L. Smead.)

A. I believe that is the statement that was prepared in your office.

Q. And do you recall about when it was?

A. It was approximately December 10, I would say, in the early part of December.

Q. And who was present? [399]

A. Mr. Lotz, yourself, your secretary. I believe Mr. Titus was present; I am not positive.

The Court: December of 1951?

Mr. Garrison: Yes, Your Honor.

The Witness: Yes. And myself.

Mr. Garrison: Q. All of these incidents occurred in '51.

Ask that this be—and it bears your signature, does it?

A. Yes, sir.

Mr. Garrison: Ask this be received in evidence as our exhibit next in order.

The Court: Admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 20 admitted and filed in evidence.

(Whereupon memorandum referred to above was received in evidence and marked Plaintiff's Exhibit No. 20.)

Mr. Garrison: Q. Now, was that the first occasion on which you had met me?

A. I believe it was.

Q. And do you remember the time of day you arrived in my office? A. No, sir, I don't.

Q. What occurred when you first arrived there

(Testimony of Ralph L. Smead.)

prior to the dictation or preparation of this statement?

A. Well, we discussed the statement, I believe, of December 6. [400]

Q. Did we have that statement then, your statement of December 6, with us?

A. I believe we did, yes, sir. We discussed the events involved in the affairs of Mr. Lotz, and then this statement was prepared.

Q. And by whom was it dictated?

A. By yourself.

Q. And do you remember, did you remain there while it was typed?

A. I don't believe we did, I don't recall.

Q. Did you come, return to the office after?

A. I don't recall when that statement was signed or where.

Q. Did you read it over before it was signed?

A. I believe so, yes, sir.

Mr. Garrison: I would like to read the statement, if I may, Your Honor.

"Memorandum.

"Re. Mid-States, American Fidelity and Public Service Insurance Company transactions.

"Mr. Lotz was first appointed General Agent by Mid-States Insurance Company on May 15, 1947. This relationship has continued until the present time, excepting that between December, 1950, and September, 1951, practically all of the business written by Mr. Lotz was placed with the American [401] Fidelity Insurance Company. The appoint-

(Testimony of Ralph L. Smead.)

ment by American Fidelity occurred approximately the 1st day of December, 1950, and at first a portion of the business written by Mr. Lotz was placed with that company, but shortly thereafter most of the writings were placed with American Fidelity. This resulted by insistence by Mr. Mark Hart, president of the American Fidelity, that most business be placed with their company.

“During this same period Mr. Lotz was the agent for several other companies for other lines, including Public Service Insurance Company, but the writings were small.

“When first appointed General Agent by Mid-States, Mr. Lotz opened a trustee account with Anglo Bank at its Oakland branch. Thereafter, in January or February of 1951, Mr. Lotz cancelled that account and transferred his trustee account to the Central Bank of Oakland and carried on his banking with that concern until August, 1951. At that time Mr. Lotz became dissatisfied with the Central Bank and cancelled that account and opened a new account with the Anglo Bank. In opening these accounts, Mr. Lotz did not exhibit the general agency agreement that he had with Mid-States and [402] was not called upon to furnish any information regarding the terms of that contract. During the first period of his banking arrangements with the Anglo, he received a large number of checks, and it is his opinion that possibly one out of twenty of these checks were made payable directly to Mid-States Insurance Company directly, the balance

(Testimony of Ralph L. Smead.)

being made payable to him as their general agent. During the second period in which Mr. Lotz had his account at the Anglo Bank there were a number of checks received, some of which were made payable to Joe Lotz, and others, principally those received from Public Service Insurance Company, were made payable directly to Mid-States.

"About July 14, 1951, the agency forwarded its check to American Fidelity in the sum of \$50,-301.88 in payment of April business. This check was returned by the bank not paid, although it was subsequently honored. Shortly after this date Mr. Hart requested financial statements from the agency and indicated interest in their financial condition.

"About July 1, 1951, the Lotz agency made arrangements with Public Service Insurance Company to acquire by reinsurance a block of Public Service business. This business was placed with the American [403] Fidelity, and the arrangement agreed upon was that 75 per cent of the premium would be paid by Public Service and 25 per cent by the agency. Public Service forwarded its check for its portion, but the agency was unable to meet its commitment and that amount remained unpaid. On August 6, 1951, Mr. Hart became insistent that a statement be furnished and demanded that Mr. Lotz and Mr. Smead come to New York not later than Monday, August 13, 1951.

"Conference was thereafter held August 13, 1951, between Mr. Hart, Mr. Feller, Mr. Sudekum, vice-president, Mr. Will, treasurer, Mr. Lotz and Mr.

(Testimony of Ralph L. Smead.)

Smead. At that time it was disclosed by Mr. Smead and Mr. Lotz that the agency was indebted to American Fidelity for approximately \$250,000, to Mid-States for \$29,000 and approximately \$10,000 to miscellaneous companies. They also stated that they had monies due them of about \$75,000 and some operating costs outstanding. At this time there was due American Fidelity \$6,600, representing their portion of the reinsurance from the Public Service deal dated back to July, 1951, and there would be due within a few days approximately \$66,000 representing May business. In this [404] conference Mr. Lotz and Mr. Smead were interrogated in great deal regarding the exact condition of their affairs, where the money had gone, and what prospects there were for ultimately meeting their obligations. At this time Mr. Smead stated that the only way they could meet their obligations would be by maintaining a large float liquidate balance. This procedure contemplated securing a new insurance company and using current premiums on new business written to liquidate the balance with the old company, in this case, American Fidelity. In this conference it was suggested that possibly Mid-States would be willing to take new business written by the Lotz agency, and it was agreed that Mr. Lotz would go to Chicago to ask Mid-States if they would take business written by Lotz. Telephone calls were placed by Mr. Lotz to Mr. Hatfield in Chicago, (Mid-States' vice-president). In placing these calls Mr. Hart directed that the calls be

(Testimony of Ralph L. Smead.)

placed station-to-station so that the place of origin would not be known in Chicago, and that Mr. Lotz be careful that it was not made known that he was with Mr. Hart or that he had discussed the matter with Mr. Hart. Mr. Hart stated to Mr. Lotz several times that he did not want Mid-States to know his [405] position in the matter; that he only wanted his account paid and he did not care how. He said that Mr. Lotz should tell Mr. Hatfield that he was looking for a better deal. Mr. Hart explained that in this way Hatfield would not be suspicious.

"In the conference referred to above Mr. Will asked what would happen if Mid-States statements were not paid and whether or not any recourse could be had against American Fidelity. Mr. Hart advised that he would worry about that when it developed.

"In the same conference it was agreed that Mr. Smead should return to Oakland to complete the audit on the May business, and it was Mr. Smead's opinion that approximately \$40,000 would be available for payment on the American Fidelity account. Mr. Hart's secretary made the arrangements for Mr. Lotz' airplane ticket to Chicago and also an exchange of tickets for Mr. Smead to return to San Francisco. At this time a special representative of American Plan by the name of Richard Cass was located in Chicago, and Mr. Cass was acquainted with Mr. Lotz inasmuch as he had formerly been employed by Mid-States. Mr. Hart told Mr. Lotz not to call on Mr. Cass because of the danger of

(Testimony of Ralph L. Smead.)

[406] Cass' disclosing to Mid-States the American Fidelity's part in the plans.

"Mr. Lotz had his appointment with Mr. Hatfield in Chicago, and Hatfield agreed to take business written by Lotz, provided it was clean business, no soldiers, and not sub-standard. Hatfield agreed to issue a new general agency contract with Lotz at this time and to permit a 15 per cent advance commission.

"On August 20, 1951, Mr. Hart and Mr. Feller arrived in Oakland and made a thorough check of the books of the agency. At this time the \$66,000 due for May business was still unpaid.

"Prior to Mr. Hart's arrival in San Francisco, Mr. Smead had a conference with Jim Russell and Mr. John Shea of the Public Service Insurance Company, wherein it was agreed that approximately \$150,000 of the business would be reinsured with one of the agency companies. At this time it was also agreed, although Mr. Smead cannot recall who made the suggestion, that the business would not be handled in the usual way, by the use of bordereaux covering all of the business of a given amount across the board, but the business would be handled on a pro rata basis and rewritten in the [407] new company. Mr. Smead reported this proposal to Mr. Lotz while he was in Chicago, and when Mr. Lotz returned the work was undertaken to cancel policies and rewrite in the name of Mid-States. Mr. Lotz failed to mention this deal in Chicago and knowledge of it was never had by Mid-

(Testimony of Ralph L. Smead.)

States. When Mr. Hart and Mr. Feller were here in Oakland they were advised of this proposal and of the fact that the premiums received for this business would be used to liquidate the balance due American Fidelity. Mr. Hart again cautioned Mr. Smead and Mr. Lotz not to allow Public Service or Mid-States to know that he had any part in the deal, and under no circumstances were they to mention his name. On August 20th, while Mr. Hart and Mr. Feller were in Oakland they agreed that the American Plan Corporation, the managers of the Fidelity Insurance Company, of which Mr. Hart is president, would advance \$50,000 on Mr. Lotz' behalf to the American Fidelity. This was intended to help take care of the statement due August 15th in the sum of \$66,000.

"In connection with the handling of the funds received on the Public Service deal, Mr. Hart instructed Mr. Smead and Mr. Lotz as follows:

"All funds received directly from Public Service [408] were to be first deposited in the Lotz trustee account, and thereafter withdrawals were to be made from that account and the monies deposited in an account with the Central Bank which was maintained by American Fidelity. All other monies received by Lotz from any other source, regardless of the person to whom they were to be paid or the account to be credited, were to be deposited in the American Fidelity account with the Central Bank.

"On August 21 and August 22, 1951, an agreement was drawn up by Mr. Hart and Mr. Feller

(Testimony of Ralph L. Smead.)

and signed by Mr. Lotz and Mr. Smead. This agreement is dated August 22. In addition to this, a letter was handed by Mr. Hart to Mr. Smead whereby he was to receive \$1000 for assistance requested in working out the liquidation of the American Fidelity account.

“The actual work of cancelling the Public Service policies and rewriting them in Mid-States was not started until the first week in September. During this period, and particularly while the policies were being written, Mr. Hart telephoned from New York almost daily, asking how long it was going to take and when he could expect the money. [409] During this time Mr. Hart was advised that there was a statement of approximately \$29,000 due Mid-States for June business, payable September 15, 1951. Mr. Hart instructed that this payment be made to Mid-States. The payment actually was not forwarded until October 15, 1951. When the checks were received from Public Service, Mr. Hart was advised over the telephone that they had been received, that they had been deposited in the trustee account and in turn withdrawn and deposited in the American Fidelity account. During this period of time Mr. Hart called daily from New York.

“The payments received and the other monies deposited in the American Fidelity account liquidated all of the balance due them except approximately \$71,000. This amount included not only premiums due them, but also traveling expenses in connection with the New York-Oakland trips and the remain-

(Testimony of Ralph L. Smead.)

ing balance of \$38,000 on the \$50,000 advance by the American Plan. This amount was taken care of by cancelling flat that amount of business and rewriting it in Mid-States. This was accomplished by dating the Mid-States policies back to date of inception. The effect of this was to remove that much business from the American Fidelity books and eliminate their [410] liabilities under the policies, and to credit the agency account with that much in premium. This transaction originated by suggestion from Mr. Hart, and Mr. Hart also suggested that Mr. Smead call Mr. Hatfield in Chicago to see if this arrangement could be worked out. Mr. Smead contacted Mr. Hatfield and presented the proposition. Mr. Hatfield said that he would advise later. In the meantime Mr. Hart called Mr. Smead, inquiring as to what was being done, and when told that no progress was being made, Mr. Hart telephoned Mr. Hatfield and discussed the arrangements which were agreed to by Mr. Hatfield, and also advised him that he would have to look to Lotz for the payment of premiums.

“Ralph L. Smead——”

Q. I notice, Mr. Smead, that on pages 3 and 4 there are a number of changes which have been made in ink by someone striking out the typewritten portions. Do you know who made those changes?

A. Well, it carries my initials, and I believe Mr. Lotz' initials.

Q. You remember when the changes were made in relation to when the document was signed?

(Testimony of Ralph L. Smead.)

A. The same time they were—it was signed, I believe. I [411] don't recall that place and time of signature.

Q. Now, as I understand it, some time after the American Fidelity account was completely paid out, you became an employee of the American Fidelity and Casualty Company, did you not, or the American Plan? A. 1951, yes, sir.

Q. What date?

A. In January, 1951—or 1952, excuse me.

Q. By whom were you employed?

A. By the American Plan Corporation.

Q. And how long were you employed by them?

A. Until October, 1953.

Q. And what was your position?

A. Well, in 1952, January, I was hired as a service representative to handle the business that had been written by Mr. Lotz and that was unexpired at that time, to handle the claims.

Q. Were you employed by them up to and through the bank case?

A. When was that, in 1950—? Yes, sir, I was employed at that time by American Plan.

Q. Going back I find a letter here I have overlooked. Will you look at that copy of the letter and see if you can identify that for me?

A. Yes, sir.

Q. And is this a copy of a letter that you sent to Mr. Hart under date of August 30, 1951? [412]

A. Excuse me—yes, sir.

Mr. Garrison: Ask this be received in evidence.

(Testimony of Ralph L. Smead.)

The Court: Admitted and marked next in order.

The Clerk: Plaintiff's Exhibit 21 admitted and filed in evidence.

(Whereupon carbon copy of letter dated August 30, 1951 to Mr. Hart was received in evidence and marked Plaintiff's Exhibit No. 21.)

Mr. Garrison: So that we keep our orientation, Mr. Smead, having jumped away from August, 1951, the Public Service rewrite was going on at that time, was it not?

A. At what time is that?

Q. August, 1951.

A. Yes, sir, latter part of August, and September.

Mr. Garrison: I would like to read this letter, if I may, Your Honor.

"August 30, 1951

Airmail

"Mr. Mark M. Hart, President
American Plan Corporation
44 Wall Street
New York, N. Y.

"Dear Mark:

"Just thought I would pass along what we are doing to clear the American Fidelity and Casualty account and let you know that your instructions are being complied with fully. We are very confident [413] that the matter will be cleared per agreement, on or before September 15, 1951.

"We experienced a few obstacles with the Cen-

(Testimony of Ralph L. Smead.)

tral Bank, but since your conversation with Mr. Smith everything will work out okay.

"It is realized that deposits have been a little slow this week, but this is definitely due to the fact that this is just a wrong time of the month for collections. We have sent out our August billings and returns will come in on those next week. We hope to collect the major portion of that billing before September 10, 1951.

"Joe and I are going to Los Angeles Friday to see if we can't together with Mr. Smead and clear his account, so in closing, Mark, I repeat that Joe and I are most anxious to fulfill our agreement and you are receiving the utmost cooperation. I will keep you advised of our progress.

"Very truly yours,

Ralph L. Smead."

Q. I notice, Mr. Smead, in the letter that Mr. Hart handed the Central Bank that morning in the enclosed envelope, it is dated August 17, 1951,—what was the date when it was handed to you?

A. I believe it was August the 22nd. [414]

Q. And Mr. Hart was in New York on August 17, was he?

A. I think he was. I believe we had a teletype message from him on or about that date.

Q. I have one other document that I don't seem to see here, but with that exception, if I may refer to that some time later, I will finish my direct testimony.

(Testimony of Ralph L. Smead.)

Oh, yes, Mr. Schimberg has called my attention to a teletype that I was looking for. I would like to ask you, Mr. Smead, referring to page 8—Mr. Bronson, of these, page 8—if you will look at the message dated September 6 and see if those messages were received and sent by you on the dates indicated?

A. The first messages? Which message?

Q. The second message at the top of the page.

A. Well, this teletype message dated September 6, 1951, was received.

Q. I see.

A. From the American Plan.

Q. Will you read that message?

A. "September 6, 1951 Joe Lotz operator, Joe Lotz Oakland——"

Q. I can't hear you.

A. (Continuing) ——"Joe Lotz operator, Joe Lotz, Oakland, American Plan operator. Would appreciate your advising address of Public reinsurance——"

well, wait, excuse—should be "Public Insurance Company. [415]

End."

"September 6, 1951——"

message continued on page 5——

"Joe Lotz operator. Address is 10 Drumm Street, San Francisco. Amount of morning deposit to American Fidelity and Casualty account \$1,718.75. Mr. Smead is in San Francisco now working on Public Service account. End. American Plan operator."

(Testimony of Ralph L. Smead.)

Q. That is the completion of that series of exchanges, is it?

A. Well, that particular message, yes, sir. Appears to be.

Q. And those messages were received and sent by you, were they? A. Yes, sir.

Q. I will show you a photostat of a statement which was introduced in the bank case as Plaintiff's Exhibit No. 3, and ask you if you recognize that? A. Yes, sir, I recall this.

Q. What is it?

A. A statement dated the 18th of December, 1951, and is additional information pertaining to Mr. Hart's visit in August of '51 at which book-keepers of Mr. Lotz were present are involved, and pertain to total accounts payable and total accounts receivable.

Q. Now, was this statement written out by you?

A. Yes, sir. [416]

Q. And do you know where you were when you wrote it?

A. I believe that statement was written on the first floor of Mr. Lotz' office. I believe it was written for, or in the presence of Mr. Titus.

Q. Being the only two persons present?

A. As far as I remember, yes.

Mr. Garrison: Ask this be received as Plaintiff's Exhibit next in order.

The Court: May be marked next in order.

The Clerk: Plaintiff's Exhibit 22 admitted and filed in evidence.

(Testimony of Ralph L. Smead.)

(Whereupon photostat of statement dated 12/18/51 was received in evidence and marked Plaintiff's Exhibit No. 22.)

Mr. Garrison: I would like to read this, if I may, into the record.

Mr. Bronson: 22?

Mr. Garrison: Yes.

"Joe Lotz——"

I can't read the writing.

"12/18/51

"During day of August 20th, 1951 while Mr. Mark Hart was in Joe Lotz' office I was asked to furnish him with the following information:

"Total prem. payable to co.'s. [417]

"Total receivables.

"I spoke with our bookkeeping department in the presence of:

"Mrs. Janice Howard.

"Miss Lyla Bowman.

"Miss Faye Roach.

"And a tape was run to furnish the above-requested information. To the best of my recollection the below figures are approximately correct:

"Total premiums payable \$287,000.

"Total receivables \$75,000.

"The following day, August 21st, 1951, I was asked to compile a listing by policy number, name of insured, amount of premiums, and by individual agents, the unpaid American Fidelity and Casualty Company accounts receivable. This information was compiled by Miss Roach and Miss Bowman of this

(Testimony of Ralph L. Smead.)

A. In the early part of September, I think the first week of September or thereabouts.

Q. Have you ever had any conversation with anyone from the Anglo Bank regarding Mr. Lotz' authority to endorse checks made payable to Mid-States Insurance Company? A. Yes, sir.

Q. Have you had more than one such conversation? A. Yes, sir.

Q. With whom and when did you have the first such conversation?

A. I had conversations with Mr. Roland and Mr. Prince. [420]

The Court: Fix the time.

The Witness: In the early part of September, the exact date I don't know. I had a conversation in person and also I had telephone conversations from those.

Mr. McCallum: Q. What was the subject and what was said during the first conversation?

Mr. Garrison: What year is this?

Mr. McCallum: I presume '51; am I right?

The Witness: 1951, yes, sir.

The Court: Do you recall the month?

The Witness: September, 1951.

Mr. McCallum: Q. He said the early part; is that correct, Mr. Smead?

A. Yes, sir, as I recall it.

Q. What was said?

A. The gentleman asked for, asked if Mr. Lotz had authority to deposit checks payable to insurance companies and I advised him that he did.

(Testimony of Ralph L. Smead.)

On, I believe, the second occasion, or on a different occasion, they asked that—asked where that was contained, and I said it was in his general agency agreement with his companies. They asked for copies, or the original contracts, which we promised to furnish—I believe Mr. Lotz was present at one or two of those conversations—which we did promise that we would furnish the bank. [421]

Then they had follow-ups on by telephone.

Q. How many follow-ups did you receive?

A. Oh, I would say at least two.

Q. Do you recall what was said?

A. They asked for the contract.

Q. And what did you say?

A. I told them on one occasion that—I believe it was while Mr. Lotz was out of town—that he would have to show them the contract on his return.

Q. What was said on the other occasions?

A. I believe that is the last conversation that I remember.

Q. Were there three, then, that you recall; three separate occasions?

A. There were three or more, yes, sir.

Q. And over what period of time did these conversations extend?

A. Oh, a period of probably three weeks.

Q. Commencing with the first part of September?

A. Still—. I would say from the, possibly, the tenth of September for a period of three weeks thereafter.

(Testimony of Ralph L. Smead.)

Q. Did you ever tell anyone at the Anglo Bank about the letters that had been introduced here as the Bank's exhibits, two, three and four?

A. No, sir.

Q. Did you ever tell anyone at the Anglo Bank that Mr. Lotz [422] had asked for authority and Mr. Hatfield had refused to give it to him?

A. No, sir.

Q. As General Manager, Mr. Smead, were the deposits by the Lotz Agency made under your supervision and control?

A. Yes, sir.

Q. I show you what purports to be three photostats—four photostats, copies of deposits, ask if those are copies of deposits made by the Lotz Agency with the Anglo Bank?

A. Would you mind repeating the question?

Q. I say, do they represent copies or photostats of deposits slips of deposits made by the Lotz Agency with the Anglo Bank?

A. I don't believe this deposit slip originated from Mr. Lotz' office. The others represent deposits made by Mr. Lotz with the Anglo Bank.

Mr. McCallum: We offer, then, those that have been identified as having been made——

The Court: Be admitted and marked, with the exception of those two.

Mr. McCallum: That is the one.

The Clerk: These two right here.

Mr. McCallum: More than two. I think there are three.

(Testimony of Ralph L. Smead.)

The Clerk: Yes. Intervening Plaintiff's Exhibit 6 admitted and filed in evidence. [423]

(Whereupon four photostatic copies of deposit slips were admitted in evidence as Intervening Plaintiff's Exhibit No. 6.)

Mr. McCallum: Q. Was the checkbook of the Trustee account of the Lotz Agency which was held with the Anglo Bank maintained and kept under your supervision? A. Yes, sir.

Q. I show you what purports to be three photostatic copies of three of the pages and ask you if you can identify those as copies from the Joe Lotz checkbook of the Trustee account with the Anglo Bank? A. Yes, sir.

Mr. McCallum may these be marked, please, as the Plaintiff's Exhibit next in order?

The Court: Be admitted and marked next in order.

The Clerk: Intervening Plaintiff's Exhibit 7 admitted and filed in evidence.

(Whereupon photostatic copies of check stubs were received in evidence and marked Intervening Plaintiff's Exhibit No. 7.)

Mr. McCallum: Q. Now, Mr. Smead, directing your attention to the deposit slip that is dated September 7, and to the item marked "Russell and Bond, \$5,547.25," is that one of the checks that the Lotz Agency received from the Public Service transaction? [424]

A. I believe it was, yes, sir.

(Testimony of Ralph L. Smead.)

Q. And it was, of course, deposited in the Joe Lotz Trustee Account with the Anglo Bank?

A. Yes, sir.

Q. And that check, you recall to whose order that check was made payable?

A. I believe it was payable to, as far as I know, it was payable to Mid-States Insurance Company.

Q. Now, will you look at the check stubs, please, and find for me where that particular deposit appears to have been entered in the checkbook?

A. What is the date of the deposit?

Q. September 7, a gross amount of \$14,790.16.

A. It appears to be on this.

The Court: What is the answer?

The Witness: Appears right below Check 5006. It is written deposit 9-7-51.

Mr. McCallum: Q. Did you understand correctly, Mr. Smead, that on December 7, 1951, there was \$14,790.16 deposited in the Joe Lotz Trustee account with the Anglo Bank of which \$5,547.25 represented a check from the Public Service made payable to Mid-States?

A. Apparently is, yes, sir.

Q. Now, at the time that deposit was made, and looking again at the check stub, how much did Mr. Lotz have in the Trustee [425] account besides the sum represented by that deposit?

A. Well, he had \$1,846.02 less \$133.48.

Q. All right. Approximately \$1700 other than the deposit?

A. Yes, sir.

Q. Now, will you look down further, please, and

(Testimony of Ralph L. Smead.)

tell us do you find a stub representing a check having been made payable to the American Fidelity?

A. Check No. 5009, amount of \$15,000.

Q. And the date of that check?

A. Well, it is a bit confusing; looks like 9-7, appears that the seven is marked through and made 9-11-51.

Q. I show you the other Plaintiff's Exhibit No. 19. Is the Check 5009?

A. 5009. Yes, sir.

Q. Now, from the actual check itself, can you tell me the date of the check?

A. The check is dated 9-7-51.

Q. In other words, does the check to the American Fidelity bear the same date then as the deposit was made?

A. Bears the date of 9-7-51, yes, sir.

Q. Now, directing your attention to the deposit slip dated September 14, and to the item \$67,500, does that represent the check received from the Public Service writings?

A. Yes, sir.

Q. And is that the check that was made payable to Joe Lotz? [426]

A. I don't know from this whether this is the one or not.

Q. Looking back at the next check stub, when do you find that the next check was made payable to the American Fidelity?

A. On September 15, 1951, Check for \$60,000.

(Testimony of Ralph L. Smead.)

Q. And what does the date of the deposit show by your check stubs?

A. September 14, 1951. [426-A]

Q. And how much money did Mr. Lotz have in the account other than what was deposited at the time the \$67,000 check was deposited?

A. This is on 9-15—9-14 a deposit of \$68,811.04.

Mr. Garrison: Don't all those figures appear from the record, Mr. McCallum?

Mr. McCallum: What figures?

Mr. Garrison: The question you just asked; it is in evidence.

Mr. McCallum: A little hard to decipher unless someone is familiar with the check book.

The Witness: I think possibly the best way to figure it out would be to read the withdrawals and deposits. At the top of the sheet there shows a figure as being on hand of \$15,703.47, a withdrawal of \$15,000. This is 9-7, apparently, deposit of 9-11-51 of \$1,062.64.

I see the balance here, leaves a balance of \$1,766.11; deposit of the 14th of September, \$4,951.98; a withdrawal 9-14-51 of \$1,056.94. So apparently at that time it was approximately \$6,000.

Q. Then also at the time, then, he drew the check to American Fidelity and Casualty for \$60,000 he had approximately \$6,000 of his own funds?

A. I don't know whether his own funds or not.

Q. Funds other than the \$67,500 check received from the Public [427] Service?

A. No, there was a deposit of \$68,000—\$68,811,

(Testimony of Ralph L. Smead.)

looks like four cents or 64 cents, in addition to the approximate figure that I gave before the withdrawal of \$60,000 on the next day.

Q. Can you tell us how much funds other than the sixty seven thousand from the Public Service he had in the account?

A. How much funds other than——?

Q. The \$67,500 from Public Service.

A. Well, it appears to be approximately \$67,500? I would say approximately seven or eight thousand dollars.

Q. At the time he drew the check for \$60,000 to American Fidelity? A. Yes, sir.

Q. Did you ever discuss with anyone from the American Fidelity as to what you were doing with the funds from the Public Service when they came in? A. Yes, sir.

Q. With whom did you have such a conversation? A. With Mr. Hart.

Q. When did that conversation take place?

A. The conversation took place during his visit of August 20, 195.

Q. What did he say?

A. And also I had conversations at later times on that. He instructed that the funds received from Public Service be [428] deposited in Mr. Lotz' trustee account, then withdrawn payable to American Fidelity and Casualty Company and deposited in the American Fidelity and Casualty account, Central Bank, in Oakland.

Mr. McCallum: Thank you.

(Testimony of Ralph L. Smead.)

The Court: Take a recess.

(Short recess.)

Mr. Bronson: Mr. Smead.

RALPH L. SMEAD

recalled to the stand as an adverse witness on behalf of the plaintiff, previously sworn.

Cross Examination

Mr. Bronson: Q. Mr. Smead, you were a witness in the proceeding that we have been calling the bank case here, were you not?

A. Yes, sir.

Q. Now, that was tried, I believe, in May of 1953, just a year ago?

A. I don't recall the date.

Q. All right.

The Court: Where was it tried?

Mr. Bronson: Right in this court before Judge Harris. I wasn't present, Your Honor.

The Court: What? [429]

Mr. Bronson: I wasn't present, but I have some——

The Court: Neither was I.

Mr. Bronson: Makes two of us.

Q. Then your deposition was taken in that case, Mr. Smead. I have the transcript of it here showing the date as April 1, 1952, about a year before the bank case went to trial; you recall that?

A. I recall the deposition, yes, sir.

Q. And a month after that deposition was taken

(Testimony of Ralph L. Smead.)

you appeared in a proceeding before the insurance commissioner that had for its purpose an examination of Joe Lotz on the conduct of his agency; you remember that?

A. That was in 1952, I believe, yes, sir.

Q. Yes. Now, in each of those proceedings you were sworn, were you not, to tell the truth before you testified?

A. Yes, sir.

Q. Not only in the deposition but in the trial and in the insurance commissioner hearing?

A. Right.

Q. You testified earlier in your examination by Mr. Garrison that when you went back to New York and arrived there on August 13 and went to the office of the American Plan in New York and met Mr. Hart, Mr. Sudekum, Mr. Will, and Mr. Feller, there, that they asked you certain questions about the debt or the amount owing by the Lotz agency to American Fidelity and [430] Casualty which you stated was about \$240,000, how much you owed to Mid-States, which you stated was about \$30,000, and to other companies which you said was between ten and twenty thousand, and that you then were asked what the receivables were of the agency and you stated it was \$75,000 approximately.

A. Yes, sir.

Q. I want to read now from testimony in the insurance commission proceeding which I'll ask you at the end of it if that was your testimony at that place. This took place between the dates of April

(Testimony of Ralph L. Smead.)

29, 30, May 1 and 2, all in 1952, and counsel, I am reading from page 263.

Mr. Garrison: I don't have a copy of the transcript, so the dates don't help me.

Mr. Bronson: Like to come up and observe?

Mr. Garrison: No, go ahead.

The Court: He is willing to trust you.

Mr. Bronson: That is nice, Judge; always nice.

Mr. Garrison: What is the page, counsel?

Mr. Bronson: Page 263 and page 264.

"Question: Is your memory good or bad on that?

"Answer: Well, I remember the discussion we had at that time. I think we owed the American Plan, or the American Fidelity and Casualty Company in premiums written approximately \$240,000, or thereabouts. That was the balance at that time to [431] date, with an estimation of how much business that had been written in the month of August to that time that would be due.

"Question: \$240,000?

"Answer: Approximately \$240,000. Now, we discussed with Mr.—well, with the gentlemen in the American Plan office, our accounts receivable on the American Fidelity and Casualty business judging from what we had written should almost cover that. We realize there was some shortage, although we didn't tell the people in the American Plan office that we thought there was probably \$30,000 difference in the amounts of our receivables and the amounts we owed them because Mr. Lotz and myself

(Testimony of Ralph L. Smead.)

knew that the situation could be taken care of. We discussed the possibility of obtaining a loan on our 20 per cent guaranteed commission.

“Question: How much was the loan or possibility of a loan?

“Answer: Well, at that time I believe we had two hundred and some odd thousand dollars unearned premium reserve, which 20 per cent of it equalled better than \$50,000, between fifty and sixty thousand dollars, and the American Plan people said, ‘Well, when you get back to the Coast see if [432] you can obtain a loan for that amount and we will guarantee that amount to your creditor and if you cannot get it maybe we can work out some advancement and loan it to you ourselves.’

“Question: Did you get that loan?

“Answer: We came back—I came back first to California, Mr. Lotz going to Chicago. I came back to California. Mr. Mead and myself attempted to obtain a loan under our contract, but it seems as though everyone we approached, and we approached a few banks, finance companies and individuals on the matter, that they didn’t understand the retrospective plan of operation. So therefore we were unable to get that loan, although it was guaranteed. So consequently the people from American Plan did loan toward our——

“Question: Indebtedness?

“Answer: Indebtedness of \$50,000.

“Question: Well now, you stated that there was approximately, according to your recollection and

(Testimony of Ralph L. Smead.)

best belief, \$240,000 due the American Fidelity and Casualty Company at the time you visited New York, so you have accounted for \$50,000. Now, where was the rest coming from?

“Answer: Well, we figured we had that at that [433] time in uncollected American Fidelity and Casualty premiums around \$200,000. As I explained, we had one very large agent in the Los Angeles territory that was quite a bit behind, and it was hurting our float proposition.

“Question: That was your brother, wasn’t it?

“Answer: That is right. It seems as though he was having collection problems himself, but that is what it amounted to, that we got behind on the float situation, that there was accounts receivable.”

Mr. Bronson: Q. You gave that testimony, did you not? A. Yes.

Q. And you represented to the insurance commissioner, who was the hearing officer there, under oath, that your receivables amounted to approximately \$200,000, not \$75,000?

A. I think, Mr. Bronson, that we based that figure on unearned premium reserves, as distinguished from uncollected premiums.

Q. Turning to the deposition in the bank case taken a month before the testimony I have just read—I am referring, counsel, to page 30 of the deposition in the bank case.

Mr. Bronson: This deposition appears, if the Court please, to have been taken by Mr. McCallum, and the questions that I am about—and the an-

(Testimony of Ralph L. Smead.)

swers I am about to read were under his examination. At the top of the page. That refers to the same [434] subject, the same incident in New York.

“Question: And you were asked some rather specific questions by Mr. Hart at that time, were you not?

“Answer: I think there were numerous questions, yes.

“Question: He asked you how much money was owed all companies?

“Answer: Well, I don’t know whether they did or not.

“Question: And you told him that there was approximately \$250,000 owed the American Plan and twenty nine thousand owed Mid-States and ten thousand to miscellaneous companies?

“Answer: I don’t know whether I did or not.

“Question: And he asked you the amount of the receivables and you said approximately seventy five thousand? “Answer: I don’t recall that.

“Question: He asked you what had happened to the monies collected and you told him that they had gone out in advance commissions and operating costs.

“Answer: I don’t know about that.

“Question: Your answer is, I take it, that you don’t remember whether those questions were asked or [435] whether those answers were given?

“Answer: That is right.”

Q. Now, I will direct your attention, Mr. Smead, to the so-called station-to-station call put in from

(Testimony of Ralph L. Smead.)

New York to Chicago while you were in New York on the same occasion. I am reading from the last line on page 117 of the record of the trial of the bank case while Mr. Smead was on the stand under oath.

“The Court: Mr. Garrison, you asked to conclude our session at a quarter of four. I have one brief statement in clarification of this matter. On page 2 of the statement, Mr. Smead, there is set forth:—” and then a quotation.

“‘In placing these calls, Mr. Hart directed——”

By the way, I will interrupt myself a minute. That was one of the statements that you had signed that was being referred to there, do you recall that?

A. The statement station-to-station?

Q. Yes. A. Yes, sir, I do.

Mr. Bronson: This is a quotation from the statement.

“‘In placing these calls, Mr. Hart directed that the calls be placed station-to-station so that [436] the place of origin would not be known in Chicago, and that Mr. Lotz be careful that it was not made known that he was with Mr. Hart or that he had discussed the matter with Mr. Hart. Mr. Hart stated to Mr. Lotz several times that he did not want Mid-States to know his position in the matter; * * *’ May I ask you whether or not that is a true statement?

“The Witness: That is not.

“The Court: That is not a true statement?

“The Witness: No, sir. Your Honor, if I may

(Testimony of Ralph L. Smead.)

say something. I offered once with Mr. Garrison to go through these statements——

“Mr. Garrison: Just a moment, Mr. Smead, just a moment.

“Mr. McCallum: Let him answer the Court.

“Mr. Garrison: Yes, but he is making a statement, I couldn't hear what he is saying.

“The Witness: I said at one time I made the offer to go through the statements with you and correct the parts that were not true and to give you a statement if you wanted it, exactly what happened.”

Q. Did you give that testimony in the bank trial?

A. Yes, sir. And I say today that the statements are not entirely true, Mr. Bronson. [437]

Q. Yes?

A. They are not; there is parts of the statement that are not true.

Q. All right. I have difficulty finding just what the truth is as you understand it.

May I read from the same record at page 33—no, from the deposition, I should say, in the bank case, from page 33 on the subject of the so-called station-to-station call conversation. Line 8. Mr. Smead was under examination at page 33 by Mr. Garrison.

“Question: Do you recall stating to me at that time that when the telephone call was placed to Chicago from New York, to make the appointment for Mr. Lotz with the Mid-States officials, Mr. Hart

(Testimony of Ralph L. Smead.)

directed that the calls be placed station-to-station so that the place of origin would not be known in Chicago? "Answer: I do not.

"Question: And that Mr. Lotz be careful that it was not made known that he was with Mr. Hart or that he had discussed the matter with Mr. Hart?

"Answer: I do not."

A. Mr. Bronson, those are the same questions pertaining to the same statements which I say are not entirely true.

Mr. Garrison: What page is that, Mr. Bronson?

Mr. Bronson: That was on page 31, counsel—wait a minute, 33.

Q. In the deposition in the bank case at page 30, counsel, this has reference to some statement that you made in those December statements with regard to—page 31—with regard to a statement that Mr. Will is supposed to have made during the course of that meeting in New York in August, on the 13th day of August, 1951. The question in the deposition by Mr. Garrison:

"Do you recall Mr. Will participating in the conversation?

"Answer:" —by yourself— "Mr. Will made notes of the conversation.

"Question: Did he make any statements in the conversation?

"Answer: I don't recall any statements made by Mr. Will.

"Question: Do you recall Mr. Will asking Mr.

(Testimony of Ralph L. Smead.)

Hart 'what will happen if and when Mid-States statements cannot be met'?

"Answer: I don't recall that conversation.

"Question: And Mr. Hart said he would worry about that if it should develop.

"Answer: I don't recall that conversation."

A. The conversation certainly took place; very definitely. [439]

Mr. Bronson: Q. Well, the question I want to know, were you under oath when you made that statement?

A. Yes, sir.

Q. Just like you are today?

A. Yes, sir.

Q. Now, with regard to the incident regarding Mr. Cass—I am reading from the testimony in the bank trial, page 78. This will be a little longer—there are about three pages of this, Your Honor, and I think that it should all be read so that in fairness all the way around.

You know what I mean by the reference to Mr. Cass and the statements that you had given that Mr. Hart suggested that he do not see Mr. Lotz—don't see Mr. Cass?

A. Yes, sir.

Q. You have that in mind, have you?

A. Yes, sir.

Mr. Bronson: Bottom of the page 78.

"Question: I will show you what is marked Plaintiff's Exhibit No. 2 in Mr. Smead's deposition and I will read to you, very short, dated 12/7/51." This is the quotation, the statement of 12/7/51, in part as follows:

(Testimony of Ralph L. Smead.)

“‘Since making my statement of December 6, 1951, a few additional items have come to my attention which I think I should state: [440]

“‘1. While in New York, Mr. Hart’s office, Joe mentioned that he wanted to see Dick Cass and Hart said several times for Joe not to see Cass as he was afraid Cass might be friendly with someone at Mid-States and tell them what we intended to do. Joe promised him he would not see Cass.

“‘During a telephone conversation with Mr. Hart in November after approximately \$60,000 premium volume of AFC policies had been cancelled and rewritten in Mid-States Insurance Company, Mr. Hart asked me to destroy any teletype messages that were sent during the course of liquidation that might be harmful to him. Ralph L. Smead.’”

End of quotation.

“Did you write that out in longhand?

“Answer: Yes, I wrote that out, I think, Mr. Garrison.

“Question: Handed it to Mr. Titus, did you?

“Answer: Yes.

“Question: And was all that untrue when you wrote it out? “Answer: That——

“Question: Just answer the question. Was it untrue?

“Answer: Not all of the original statement; [441] there were certain small portions that might be true, but——

“Question: The majority of it was untrue?

(Testimony of Ralph L. Smead.)

“Answer: The majority was untrue and very definitely untrue. [441-A]

“The Court: The majority of this last supplement?

“The Witness: The original supplement of the original letter.

“Mr. Garrison: Question: Were you talking about the supplement?

“The Court: I think counsel directed his attention to the supplement.

“The Witness: There is—I don’t think that supplement is true either, from my recollection. That is something that Mr. Titus and I talked about, because he asked me the question if—he asked Joe if he saw Mr. Cass while he was in Chicago.

“Mr. Garrison: Did you fabricate all this conversation with Mr. Hart and make that up?

“Answer: Mr. Hatfield and myself did, yes.

“Question: Mr. Hatfield wasn’t present in New York, he didn’t know what Mr. Hart had said?

“Answer: That is true, he didn’t say what is in this——

“Question: Who suggested this conversation alluded to Mr. Hart about what he told Joe to do or not to do in Chicago about Mr. Cass; where did that all originate? [442]

“Answer: I don’t know, Mr. Garrison, originated between Mr. Hatfield and myself.

“Question: He wouldn’t have had any way of making that up, because you were present in New York when this meeting——

(Testimony of Ralph L. Smead.)

“Answer: That is true.”

and then another subject is taken up.

Q. Now, turning to the deposition, page 31, bottom of the page—now, wait a minute, I may be mistaken on my reference. This has reference to the circumstances of Lotz going to Chicago after the meeting of—

The Court: After the New York meeting?

Mr. Bronson: Yes.

“Question: Did Mr. Hart suggest to Mr. Lotz that he would go to Chicago and see Mid-States officials?

“Answer: I don’t recall whether it was Mr. Hart’s suggestion. I believe Mr. Lotz had plans to go to Mid-States Insurance Company.

“Question: Did Mr. Hart repeat several times to Mr. Lotz that he did not want anyone at Mid-States to know the American Fidelity’s position in the matter?

“Answer: I don’t recall that conversation.”

This has reference, if the Court please, to—and the [443] witness—to the testimony given today and the statements with regard to the deposition being made that was made on the Public Service deal through the trustee account, bottom of page 81 of the bank trial, when Mr. Smead was under examination, under oath, on cross examination:

“Question: Now, Mr. Smead, is it true or is it not true that Mr. Hart told you to deposit these Public Service funds first in the trustee account

(Testimony of Ralph L. Smead.)

and then in the American Fidelity and Casualty Company account at the Central Bank?

“Answer: It is untrue.

“Question: Did you make that all up when you told it to me in my office?

“Answer: Mr. Hatfield and I made up all the statements, Mr. Garrison.

“Question: Well, you didn’t say anything about that in the statement that you wrote out, that you first wrote, this is something that has developed since your first statement.

“Answer: I think it is in the original statement also.

“Question: ——”

By Mr. Garrison:

“It just doesn’t happen to be.

“But anyway, you did transfer the money [444] immediately out of the trustee account into the American Fidelity Account, didn’t you?

“Answer: We wrote a check.

“Question: Yes, sir.

“Answer: As that is a matter of record.

“Question: Yes, sir, it is a matter of record, and transferred there almost the same amount within the week, wasn’t it?

“Answer: I don’t know for sure, Mr. Garrison.

“The Court: Within the week of the 24th?

“Mr. Garrison: Well, within two or three days following, I don’t know just how close, but very close, and Mr. Smead knows all about it.

“Mr. Garrison: Question: And you are still

(Testimony of Ralph L. Smead.)

working for the American Plan and American Fidelity and Casualty?

“Answer: Employed by the American Plan Corporation.

“Question: Wholly owned subsidiary of American Fidelity and Casualty?

“Answer: I don’t know that, I don’t believe it is.

“Question: You testified to it earlier in the day.

“Mr. McCallum: I don’t recall he said wholly [445] owned subsidiary, Mr. Garrison.

“Mr. Garrison: Question: I think you said managers of the business.

“Answer: You as automobile managers under a management contract, but the financial relationship, I don’t believe they are owned by the American Fidelity.

“Question: I see. Your technicality is well taken.

“So I take it then, that—do I understand that Mr. Mead, Mr. Lotz’ attorney, was never present when any of these statements were given by you and Mr. Lotz in this connection?

“Answer: We are talking about the original statements?

“Question: About your statements.

“Answer: I don’t recall whether he was in your office or not.

“Question: No, he wasn’t in my office. Well, he might have been, but was he present when any of the earlier statements were taken?

“Answer: Mr. Hatfield and I made this original statement up at night, wee hours of the morning.

(Testimony of Ralph L. Smead.)

“Question: I am not interested in that, my question is: [446]

“Was Mr. Mead ever present when any of the statements were taken?

“Answer: Besides these two, are there other statements?

“Question: Any statement.

“Answer: Not to my knowledge, no.

“Question: Your positive testimony he was not present?

“Answer: Well, I only know of this statement and one that was in your office.

“Question: And he wasn't present?

“Answer: He wasn't present at those two.

“Question: He did see this statement, however, when he acknowledged it as a notary, didn't he?

“Answer: I don't know whether he did or not.

“Question: Weren't you present when he acknowledged it? “Answer: Yes.

“Question: He had it in his hand, didn't he read it over?

“Answer: I am not sure whether he did or not.

“Question: You mean that Mr. Mead would let Mr. Lotz, his client, sign something of this importance, ten pages handwritten, and not read it?

“Mr. McCallum: Objected to as calling for his [447] opinion.

“The Court: Sustained.

“Mr. Garrison: Question: And can you tell us you don't know whether he read it or not?

“Answer: I don't know, no.

(Testimony of Ralph L. Smead.)

“Question: Don’t you know as a matter of fact that there was a very great discussion with Mr. Mead about this statement?

“Answer: There was a discussion in his office about the statement.

“Question: Well, did he know that this was fabricated? “Answer: He did not——

“Question: And made out of whole cloth?

“Answer: I don’t know how far we went through the statements, I recall that he witnessed the signature.

“Question: Did he know that it was all a fabricated pack of lies?

“Answer: I didn’t tell him that until some time later.

“Question: At the time you didn’t tell him?

“Answer: That’s right.

“Question: You knew that I was representing Mid-States and Mr. Hatfield, didn’t you? [448]

“Answer: Yes, I did.

“Question: Why didn’t you tell me it was all fabricated and made up?

“Answer: Because I didn’t know your designs or purpose, Mr. Garrison.

“Question: You didn’t, huh?

“Answer: No.

“Question: Did you suspect they were the same as yours?

“Answer: I didn’t have any except to assist Mr. Hatfield.

“Question: I see. I think that is all.”

(Testimony of Ralph L. Smead.)

Q. Now, taking that statement of December 6, the first and longest, the ten-page one that went into the wee, small hours, there was drinking going on during that period, wasn't there?

A. I don't know, what——

Q. As you have sworn on other occasions—I beg your pardon?

A. What do you call drinking?

Q. Intoxicating liquor.

A. Yes, there were approximately two, I don't think more, beers consumed. There was, however, drinking involved.

Mr. Bronson: That is all, Your Honor.

Mr. Kakures: No questions, Your Honor.

Mr. Garrison: Can I see that transcript? [449]

Mr. Bronson: You mean the insurance——

Mr. Garrison: No.

Mr. Bronson: I will give you all of these; I may have left some of the markers out.

Mr. Garrison: Your Honor, I haven't had a chance to find my places in this transcript of the trial; I didn't have a copy of it. It is five minutes to four; would it be out of order if I suggested——

Mr. Bronson: Quite agreeable to me.

The Court: After you look at that clock it is a clear indication to me what you want.

Mr. Garrison: Not as lazy as I appear, but I have a good excuse here anyway.

The Court: Very well, take the adjournment until ten o'clock.

(Whereupon an adjournment was taken until
Friday, May 7, 1954 at 10:00 o'clock a.m.)

The Clerk: Mid-States Insurance Company versus American Fidelity and Casualty Company, further trial.

Mr. Garrison: Ready.

Mr. Bronson: Ready, Your Honor.

The Court: Proceed. Take the stand, please.
Let's proceed in this case.

The Clerk: Ralph L. Smead to the stand, heretofore sworn.

RALPH L. SMEAD

one of the defendants herein, recalled as an adverse witness on behalf of the plaintiff herein, under Rule 43(b) of the Federal Rules of Civil Procedure, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as herein-after indicated:

Mr. Garrison: I have no questions of Mr. Smead myself, Your Honor please.

The Court: Any further questions, Gentlemen?

Mr. Garrison: Unless Mr. Smead has some comment he wishes to make.

The Witness: If I might.

Mr. Bronson: I think that is a little irregular, if I [451] may say so. This is a civil proceeding between certain parties—Oh, I beg Your Honor's pardon, he appears pro per; I had forgotten that, Judge.

Cross Examination—(Pro Persona)

Mr. Smead: If I might, I would like to comment

(Testimony of Ralph L. Smead.)

on the difference in some of the depositions and testimonies that I have given prior to this trial.

I think most of them are in connection with some written statements that I have given to, I think, both parties in this case, the Mid-States Insurance Company and the American Fidelity and Casualty Company.

I have said in different cases that parts of these statements are not true, and that is correct, very definitely. However, I think that the statements as written contains most of the facts that happened.

During the periods that these previous matters took place, the depositions and the other proceedings, I was employed with the American Plan Corporation. I was last employed as the Pacific Coast Manager of that Company.

I have talked on many occasions with Mr. Hart, who was President of the American Plan, pertaining to those statements. The first time, I believe, I talked to him was in December, shortly after the statements were given, by telephone, in New York. I talked with Mr. Hart in person. He came to [452] California in January of 1952, and he wanted to know specifically what was in the statements. I told him that the statements covered primarily what had happened in the liquidation of Mr. Lotz, including what had happened in our New York conference in our office.

Mr. Hart said that he was very concerned over the statements, and that if there was any proceedings ever negotiated against him that he couldn't

(Testimony of Ralph L. Smead.)

stand the statements, he would have to do something to refute them. He asked myself, Mr. Lotz, to come to San Francisco and give a statement in the office of Mr. McKinnon, Mr. Bronson. Pertaining to a new statement, he said that he definitely had to change the figures in the statements, the amounts payable or receivable, rather, by Mr. Lotz. I did not have copies of these statements that we referred to in my possession.

Mr. Hart said to me it was best that we try to forget the things that were contained in these statements, and that is what I have—what I was trying to do during these periods is to forget these things. I did not have any opportunities to review the statements in detail until within the last two weeks during this time.

The Court: Is that all you wish to say?

The Witness: I believe that about covers the statements, things that happened.

The Court: If I understand you, then, you admit yourself [453] you lied?

The Witness: Yes, sir. I tried to keep from bringing out the facts; I tried to answer a question, Your Honor, in a round-about way.

The Court: What prompted you to do that?

The Witness: Mr. Hart, Your Honor.

The Court: There must have been some other purpose in your misleading; he didn't force you to, did he?

The Witness: I guess not in that sense, but I was employed by him, Your Honor, I was working

(Testimony of Ralph L. Smead.)

for him. I had constant pressure on that subject. I tried not to lie, Your Honor, during these statements. I came up—I have been in the hospital since in February, I had six weeks, five, six weeks in the hospital, I gave this a lot of thought. I knew the matter was coming up this year. I tried to come up here this time, I wanted to present the facts as I knew them in full, I didn't want to hold back anything, regardless of what it might favor or who it might not favor. I was familiar with everything that happened in this proceeding that Mr. Lotz is involved in.

I think Mr. Lotz is a very fine man, I love him like a father. He is involved in something between two insurance companies, and that is what happened.

The Court: All right. Step down.

Mr. Bronson: May the witness remain there a moment, Your [454] Honor?

The Court: All right.

Mr. Garrison: Your Honor, if I could ask the witness one or two questions.

The Court: All right.

Redirect Examination

Mr. Garrison: Mr. Smead, you say that there are some respects in which the statements are not accurate? A. Yes, sir.

Q. Would it be difficult for you to point out to the Court which portions of the statements might be inaccurate?

(Testimony of Ralph L. Smead.)

A. No, sir, it wouldn't.

Q. Would you do it, please?

A. Yes, sir.

Q. So that there will not be any misunderstanding about it.

A. I have primary reference, Mr. Garrison, to the statement in your office, if I might have that one also.

Q. Oh, yes.

A. The first paragraph of this memorandum statement, which was taken in Mr. Garrison's office, pertains to the appointment of Mr. Lotz by American Fidelity and Casualty Company, and it reads, the latter portion:

"The appointment by American Fidelity occurred approximately the 1st day of December, 1950, and at [455] first a portion of the business written by Mr. Lotz was placed with that Company, but shortly thereafter most of the writings were placed with American Fidelity. This resulted by insistence by Mr. Mark Hart, President of the American Fidelity that most business be placed with their Company."

I recall that at no time Mr. Hart during that period insisting or demanding or in any other way trying to get more business in his Company. That portion of the statement I can't say is correct.

Q. Was that subject discussed after the document was prepared in my office?

A. I don't recall, Mr. Garrison, what might have prompted that portion of the statement.

(Testimony of Ralph L. Smead.)

Q. The statement got in there, but was it called to anyone's attention after it was dictated?

A. Apparently not.

Q. Any other portions?

A. Yes, sir, I believe there are, if I might review this.

(Witness reading to himself.)

The paragraph on the third page reads:

"On August 20, 1951, Mr. Hart and Mr. Feller arrived in Oakland and made a thorough check of the books of the Agency. At this time the \$66,000 [456] payment due for May business was still unpaid."

Mr. Hart and Mr. Feller at that time did not make a thorough examination of Mr. Lotz' books, to my knowledge.

Q. Was that inaccuracy referred to after the document was typed up?

A. Well, possibly there was a misinterpretation of what they actually did do.

Q. What did they actually do?

A. When Mr. Hart and Mr. Feller were here, they asked that we furnish them with a tape on the amounts that we had receivable and the amounts we owed.

Q. The difference you point out is they didn't——

A. They didn't actually check the books to my knowledge, no, sir.

On Page 4, there is a paragraph pertaining to the handling of funds received on the Public Service deal.

(Testimony of Ralph L. Smead.)

“* * * Mr. Hart instructed Mr. Smead and Mr. Lotz as follows:

“All funds received directly from Public Service were to be first deposited in the Lotz Trustee account, and thereafter withdrawals were to be made from that account and the monies deposited in an account with the Central Bank which was maintained by American Fidelity. All other monies received by Lotz from any other source, [457] regardless of the person to whom they were to be paid or the account to be credited, were to be deposited in the American Fidelity Account with the Central Bank.”

The last part of that statement I cannot recall Mr. Hart instructed all other monies to be deposited direct to the American Fidelity Account without first being deposited in Mr. Lotz' trustee account. I believe we did make some deposits of funds received by Mr. Lotz directly to that account without going through the normal Trustee account, but I cannot say that—excuse me—that Mr. Hart gave those specific instructions.

Q. Was that inaccuracy called to my attention after the document was prepared?

A. No, sir.

Q. It got in there.

A. It got in there.

Q. But no attention was called to it at the time?

A. Possibly it was another case of misinterpretation.

This paragraph that pertains to an agreement

(Testimony of Ralph L. Smead.)

that was handed to me, it says by Mr. Hart, actually I believe it was Mr. Feller that gave that, if it is of any importance, the party that actually did it, as I recall.

I think this completes this one. I remember reading this over carefully in my home not long ago, and I noticed at that [458] time, I think a couple of technicalities, but——

Q. Let me ask you, are the statements respecting the figures, the amounts due and the Public Service transactions and the American Fidelity re-writes, so-called, are those statements essentially correct? A. Yes, sir.

Q. And the other inaccuracies would be of the same type you referred to in the present statement?

A. Yes, sir.

Q. Mr. Smead, were you and Mr. Lotz represented at the time of the Insurance Commissioner's hearing?

A. Mr. Lotz—Yes, sir, Mr. Lotz and I were represented.

Q. Were you and Mr. Lotz represented at the time of the deposition that has been referred to here that was taken in the Bank case? I mean represented by Counsel?

A. I believe that we were represented. However, I don't recall that Counsel was present; I am not certain of that.

Q. Well, if I showed you the deposition that was taken in the Bank case, particularly Page 2 thereof,

(Testimony of Ralph L. Smead.)

would that refresh your recollection? At the top of the page.

A. This is the Anglo Bank deposition?

Q. Yes, sir. A. And this was——

Q. Of yourself.

A. In Mr. McCallum's office? [459]

Q. Yes, sir.

A. And this was taken in—on April 1, 1952. Yes, I recall, Mr. Garrison.

Q. Who represented you and Mr. Lotz at that time? A. Mr. Byron L. Dusky, of Oakland.

Q. And who paid his fee?

A. The American Plan Corporation.

Q. You were employed by the American Plan?

A. Yes, sir.

Mr. Garrison: That is all.

Mr. Bronson: Now, if the Court please, I have a few questions to ask Mr. Smead in view of this extraordinary situation here, but I would like the privilege of Court and Counsel of having my associate, Mr. McKinnon, examine him about a conversation that Mr. McKinnon had with Mr. Smead in Mr. McKinnon's office at which I was not present, and if we may have that privilege——

Mr. Garrison: No objection, of course.

Mr. Bronson: All right.

Recross Examination

Mr. Bronson: Q. Now, returning then to the last matter you spoke of first, as it comes on top

(Testimony of Ralph L. Smead.)

here, Mr. Dusky is a practicing attorney in Oakland, isn't he? A. Yes, sir. [460]

Q. Did you tell Mr. Dusky, your attorney, before you went to that deposition, at which he there represented you, that you were telling what somebody has called a pack of lies, what you call a pack of lies?

A. No, sir, not what I call a pack of lies, Mr. Bronson, that is not my term.

Q. I understand that, but—it was Mr. Garrison, that is right, but did you tell him that you proposed to go under oath over there and tell lies? Did you tell Mr. Dusky, the attorney?

A. I don't—I did not tell Mr. Dusky I proposed to tell lies, Mr. Bronson. I have not proposed to tell lies at that time in that sense; I tried to keep from disclosing information.

However, at the same time, I have tried not to lie.

Q. All I want to know is whether you told a practicing attorney and an officer of the court that what you were going to say in the deposition wasn't true before you went in there and told those things that were not true?

A. I have discussed the statements with Mr. Dusky, yes, sir, and the accuracy of the statements.

Q. You told him what you proposed to say on the subject of the statements in the deposition?

A. I don't think I told him what I proposed to say in those words, no, sir.

Q. All right. [461]

(Testimony of Ralph L. Smead.)

Well, now——

A. I mean, it was definitely understood, and it was a plan that the statements were to be gotten away from; that part is very true.

Q. Now, let me ask you about the proceedings in the Insurance Commissioner's office. That was a proceeding where they were examining the conduct of Joe Lotz Agency business on the question of whether they should or should not take away his license to act as a general agent, isn't that true?

A. That was the proceedings, yes, sir, by the Department; yes, sir.

Q. You weren't under the wraps of any attorney in that proceeding, were you, you personally?

A. What do you mean by that?

Q. Who represented Mr. Lotz in that proceeding?
A. Mr. Dusky, I believe.

Q. And you were sworn in that proceeding, were you not, to tell the truth?
A. Yes, sir.

Q. And then when you got around to the trial last year, again you were under oath, and gave all these statements?
A. Yes, sir.

Q. Is that true?
A. Yes, sir.

Q. And, as a matter of fact in September or October of last [462] year, some months after the trial and before this trial came along, you were discharged from the employ of the American Plan, were you not?

A. Yes, sir. October 1, I believe it was.

Q. And it was not in connection with any illness, was it?

(Testimony of Ralph L. Smead.)

A. It was definitely not, to my knowledge.

Q. And they charged you with some misconduct in the conduct of their work?

A. No, sir, that is very untrue.

Q. That is not true?

A. That is very untrue, to my knowledge I have never been charged in connection with my job with the American Plan with any misconduct. Never.

As a matter of fact, the Vice-President that came here from New York could not talk long enough how sorry Mr. Hart, himself, and everybody else that they had to close the Oakland office, due to expenses that they couldn't afford it, and he talked about would I be interested in coming to New York and working there, going to some other territory and working. That was Mr. Clyde Cunningham, talked at great length.

Q. Let me ask you this: As I correct in understanding you, the suggestion of your testimony that you state to Judge Roche here this morning that you were under some pressures or influence from the American Plan in making the untrue statements that you did in the Insurance Commissioner's office and in the [463] deposition that was taken before the Bank trial and in the Bank trial itself before Judge Harris, is that what you are suggesting, under oath, that you were under some pressure or influence? A. Yes, sir.

Q. From the American Plan?

A. From Mr. Hart.

Q. Yes. A. To be specific.

(Testimony of Ralph L. Smead.)

Q. Now, you admit, do you not, that when you made those statements that you made on the various exhibits here, specifically December 6, 7, 8 and 18, that you were under some pressure then, too, weren't you?

A. Not the same type of pressure, Mr. Bronson, that was involved in these others. I will certainly say that.

Q. You react differently to one pressure than you do to another?

A. They are different types of pressure, yes, sir.

Q. Did you discuss with Mr. McKinnon when you came over to the office, the pressure you were put to at the time those statements were taken on the dates that I last mentioned?

A. I believe we did, yes, sir.

Mr. Bronson: That is all. [464]

Recross Examination—(Continued)

Mr. McKinnon: Q. You remember giving the deposition in the Bank case? A. Yes, sir.

Q. You remember coming to my office a little while after that deposition was taken?

A. This was what month, Mr.—April or May? I have been in your office on different occasions, I remember that.

Q. The deposition was taken on April 1, 1952. You want to look at that? Have you seen that?

A. I recall this deposition, yes, sir.

Q. Now, I put my question to you again: Do you remember coming to my office after this deposition was taken?

(Testimony of Ralph L. Smead.)

A. At what time, Mr. McKinnon?

Q. Anytime.

A. I have been in your office—I have been in your office I would say definitely after April 1, 1952, yes, sir.

Q. All right. You remember that I asked you this—you remember my saying to you, “I have read these statements that you gave in December, 1951, and I have now read, or heard all the testimony you gave in that deposition which conflicts.”

You remember my saying, “What happened; what is the truth in this matter?” Do you remember that?

A. Would you give it to me again, I don’t remember all of it. [465]

Mr. McKinnon: Mr. Reporter, would you read the question, please.

(Record read.)

A. Yes, sir, I do.

Mr. McKinnon: Q. All right. Then you remember replying to me substantially as follows: You first discussed the \$75,000 in receivables that are referred to in the statement as having been quoted in the August 13 conference in New York, and you remember telling me that it would have been impossible to compute those figures from the books in view of the state of the books at that time?

A. I remember that, I believe I remember that discussion, yes, sir.

Q. All right. Then do you remember discussing with me the December 6th statement, that is the

(Testimony of Ralph L. Smead.)

ten-page handwritten statement that you wrote and signed, was for that date, and do you remember telling me that the reason why that statement was written was that Mr. Hatfield got you drunk that night?

A. I don't remember saying, Mr. McKinnon, that Mr. Hatfield got me drunk.

Q. You don't? A. No.

Q. You remember telling me you were drunk that night?

A. No. I remember telling you that Mr. Hatfield and I had had a couple of beers during the course of the preparation of the [466] statement, but I don't remember the—that word, no, sir.

Q. Well now, look, we are not going to quarrel about words—you have been——

A. A couple of beers don't make me drunk.

Q. Just a moment. You have been discussing words all through your testimony in this case. I don't want to quarrel about words. The word "drunk" means intoxicated, and reciprocally if you have a third word for it, you may use it, but you wish to deny that you told me that on that occasion when you wrote that ten-page statement you were drunk, intoxicated, under the influence, or any other expression to indicate that state of mind?

A. Mr. McKinnon, I possibly told you, and I think I remember telling you, that Mr. Hatfield and I did have a couple of drinks, a couple of beers, but I cannot recall stating to you that I was intoxicated or drunk while the thing was being written.

(Testimony of Ralph L. Smead.)

Q. Well, I will refresh your recollection a little bit further. Do you remember telling me, "Mr. McKinnon, I am not a drinking man and the influence of the liquor on me that night was very marked."?

A. No, sir.

Q. You don't remember anything——

A. No, sir.

Q. ——to that effect? [467]

A. No, sir.

Q. Very well. Do you remember this: Now, remember carefully, do you remember telling me that you wrote the statement in your handwriting, but that it was dictated to you by Mr. Hatfield in the main, major portions of it were dictated to you by Mr. Hatfield? You remember that?

A. Yes, sir, I did.

Q. Now, do you remember telling me this: that on occasion you would say something was true, you put it down, and then when you put it down he would laugh and say, "That's a good one, isn't it"? You remember that?

A. That is an actual fact, Mr. McKinnon, the conditions are changed from that, if I might state it that——

Q. Quite changed since then?

A. I might say to you, Mr. McKinnon, too—Your Honor, may I?

Mr. McKinnon: Well, if it explains your answer; if you wish to go into something that isn't responsive to my questions, someone here, or you may on your own behalf, when I am through, go

(Testimony of Ralph L. Smead.)

into it. If you merely wish to explain your answer——

The Witness: No, sir, it is not.

Mr. McKinnon: You withhold your comment until I am finished.

Q. Do you recall Hatfield telling you that they had to get someone on something or that Joe Lotz would be out of business— [468] pardon me, I wish to strike that, Your Honor, because I omitted a phrase.

Do you remember telling me that Mr. Hatfield told you that they would have, either have to get something on someone or Joe Lotz would be out of business? A. Yes, sir.

Q. You remember telling me that at the time these statements were procured from you you received promises from representatives of Mid-States of your still having a job there if you would give the statements?

A. I recall telling you, Mr. McKinnon, that I at one time had received an application from the Mid-States Insurance Company for employment. That was in connection with the continuation of Mr. Lotz' business or the handling of the unexpired and remaining policies. I remember telling you that. I further remember telling you that I did not complete that application for employment. But I do not recall telling you that Mid-States Insurance Company told me that if I would give them the statements that I had a job with them. No, sir, I do not.

(Testimony of Ralph L. Smead.)

Q. You don't recall whether you did or not?

A. I don't recall telling you that.

Q. I understand. Now, let me put it further to you; you may have told me that, may you not?

A. I don't think I did, Mr. McKinnon.

Q. You are not sure? You want to go under oath and say you [469] didn't tell me that?

A. Well, the only thing that I can say that I remember talking to you, remember telling you about this Mid-States situation, that I definitely don't remember telling you that Mid-States Insurance Company had offered me employment if I would give the statements.

Q. Very well.

The Court: You were hopeful you would get employment—— The Witness: No, sir.

The Court: At any time?

The Witness: No, sir.

The Court: All right, proceed.

Mr. McKinnon: Q. Do you remember telling me that the things that were against the American Plan and American Fidelity in the statements you gave were dictated by Hatfield and that they were not true? You remember that?

A. I do, yes, sir.

Q. All right. You remember telling me that Mr. Hart did not engineer this deal?

A. Yes, sir, I did.

Q. All right. Do you remember discussing with me the question whether you acted as the representative of American Plan during the period imme-

(Testimony of Ralph L. Smead.)

diately following August 22 and until American Plan or American Fidelity had been paid; you remember that? [470]

A. May I have the question again?

Mr. McKinnon: Will you read the question?

(Record read.)

A. Yes, sir.

Q. You remember telling me you did not in fact act as their representative? A. Yes, sir.

Q. Do you remember telling me that the figures in the statement of December 18, 1951, could not have been gotten up or known at that time because the books did not reflect those figures at the time those things were happening? You remember that?

A. Mr. McKinnon, I remember the figures that Mr. Hart gave you at the time they were taking the statement. I believe Mr. Hart was dictating the statement in your office.

Q. I am not talking about that occasion. I am talking now about the occasion on which you visited my office which was shortly after the taking of the deposition, of your deposition in the bank case, and I asked you the question, which you doubtless remember. Will you now answer it? If you don't remember the question, we will put it to you again.

A. I don't remember discussing—yes, I do remember those figures, yes, sir.

Q. No, I didn't ask you for figures.

A. Discussing those figures with you. [471]

Q. Well I asked you a specific question and you

(Testimony of Ralph L. Smead.)

haven't yet answered it. I assure you it isn't very difficult.

A. May I have the question again?

Q. Yes, of course. I will put it to you again so the reporter won't have to go back among his notes.

Do you remember telling me in this conference between you and me that the figures contained in this statement of yours, which is dated December 18, 1951, could not have been gotten up or known then because at that time the books did not show those figures?

A. Mr. McKinnon, I told you that at one time; I don't remember when I told it to you.

Q. Very well.

A. I definitely told you—I gave you that statement.

Mr. McKinnon: That is all, Your Honor.

The Witness: I would like to, if I might, Your Honor, in connection with Mr. McKinnon's statements, make one statement pertaining to the statement that was dictated in his office in which Mr. Hart, Mr. McKinnon, myself, I believe Mr. Lotz, were present.

Mr. McKinnon: Pardon me, if the Court please. For clarification, I have not referred in my interrogation of this witness to a written——

The Witness: I am referring——

Mr. McKinnon: I know, to a written statement this witness [472] gave me. I want the Court to be clear he is talking about another thing.

The Witness: I am sorry if I brought in another

(Testimony of Ralph L. Smead.)
subject, but I intended to talk about these figures Mr. McKinnon has brought up.

Mr. Hart, before we went to Mr. McKinnon's office, said we cannot give Mr. McKinnon these figures. And at other times while Mr. Hart was here and at other times after Mr. Hart was here, he has told me that Mr. McKinnon would not represent him if he knew these facts.

Mr. Garrison: I have no questions.

The Court: Step down.

(Witness excused.)

Mr. Garrison: Call Mr. Horton.

E. W. HORTON

called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Court: What is your name, please?

The Witness: E. W. Horton.

The Court: Where do you reside?

The Witness: In San Francisco.

The Court: Your business or occupation?

The Witness: I am a member of the firm of Lester, Herrick [473] and Herrick, certified public accountants.

The Court: How long have you been so engaged?

The Witness: With the present firm for nearly six years, and prior to that from 1925.

The Court: Here in San Francisco?

The Witness: No, sir, I was part of the time on

(Testimony of E. W. Horton.)

the East Coast of the United States, and part of the time in the Philippines and China.

The Court: Take the witness.

Direct Examination

Mr. Garrison: Q. And in what territories does the firm of Lester, Herrick and Herrick operate?

A. We operate principally on the West Coast of the United States. We have offices in Eureka, San Francisco and Los Angeles.

Q. You yourself are a certified public accountant? A. Yes, I am.

Q. Were you employed to make an audit of the books and records of the Lotz Insurance general agency? A. My firm was.

Q. When were they employed?

A. December, 1951.

Q. By whom?

Q. By Mid-States Insurance Company. [474]

Q. Did you make such an audit?

A. Yes, I supervised the examination.

Q. How many men did you have working under you? A. I think there were three.

Q. Where did you make the audit?

A. In Joe Lotz' office in Oakland.

Q. And did you commence at the time you were first employed? Was the audit started shortly after you were first employed?

A. Yes, very shortly after.

Q. As of what date?

A. May I ask what you mean as of——

(Testimony of E. W. Horton.)

Q. What date did you start the audit?

A. We started in December, 1951.

Q. December? A. December, 1951.

Q. Was Mr. Lotz there at that time occasionally?

A. He was there occasionally, yes.

Q. Did he cooperate with you in making available the books and records? A. Yes.

Q. Were officials of the Mid-States Insurance Company there?

A. They were there for a short time.

Q. And did they assist in making available the records? A. Yes.

Q. Did you find that all of the normal records that would be [475] kept in an office of this kind were present, at least as to the physical books?

A. The records were there, but they weren't in too good shape.

Q. Well, nothing had been removed as far as you could tell? A. No.

Q. And what was the condition of the accounts when you first went in there?

A. They weren't currently maintained, they hadn't posted up the general ledger accounts for several months when we were in there.

Q. Could you tell us just briefly some of the procedures involved in insurance bookkeeping in an operation of this kind?

A. Well, in insurance bookkeeping the primary function is to record the insurance written, amounts chargeable to the various sub-agents, and the collec-

(Testimony of E. W. Horton.)

tions of premiums and the remittance of those premiums to the various insurance companies.

Q. And what did you do with respect to the books and records in the Lotz office as a part of your audit?

A. Well, the first thing we did, we had to do a certain amount of bookkeeping work which I used one of our bookkeepers on to post up the records, as I recall, for the month of September, October and November, before we began our regular audit.

And then we followed the regular audit procedures by checking the bank accounts and taking off trial balances of the accounts receivable, amounts due from sub-agents, and trying to [476] confirm those balances, and trying to establish amounts due to the various insurance companies. And as a result of that it required considerable work to get up those figures.

Q. Were you able to complete the bookkeeping functions that you undertook?

A. Yes, we posted up the books through November, 1951.

Q. And in that work of making the audit were you able to determine the sources from which Mr. Lotz' income came?

A. We analyzed the collections to try to determine the sources from whom they received the monies.

Q. And how would you do that as a practical matter?

A. They had a collection sheet each day there

(Testimony of E. W. Horton.)

in which they would indicate from whom they collected the monies and for the account of what insurance company, and by that process we analyzed and tried to determine the premium collections as applicable to the various insurance companies.

Q. And then the premium income would be credited to the particular insurance company's account for whom the collection had been made?

A. Well, the premium collections, as a book-keeping application, would be first credited to the sub-agents' account. As far as funds deposited in the bank account, the funds would be withdrawn and paid to the insurance companies.

Q. I see, but his books reflected first the insurance company that the collection **had been made** for and that account [477] would show the amount collected?

A. They tried to show for whom the premium collections were for, yes.

Q. And then did you have access to the bank records?

A. Yes, we took the bank statements and checked the recorded receipts to the bank deposits shown on the bank statements.

Q. And did you check these collections back against the business that had been written in a particular company to see that they tallied?

A. As I stated, we analyzed the premium receipts and allocated those to the respective insurance companies applied.

(Testimony of E. W. Horton.)

Q. And his income was, for all practical purposes, premium income, wasn't it?

A. Well, commissions would be his income, but premiums would be credited to the sub-agents' account.

Q. That's accurate, yes, but the monies that he received in the first instance from the sub-agents was essentially premium income?

A. Premium income, that's right.

Q. Then did you—were you able to determine from the bank records and his bank books where the money went after it was deposited in different accounts?

A. We could check out the cash disbursements and tell to whom monies were paid.

Q. I see. And how many accounts did he have?
[478] A. What kind?

Q. Joe Lotz' bank accounts.

A. As I recall, he had a trustee account, he had two trustee accounts; one was at the Central Bank, which was discontinued, as I remember, in September, and opened up an account in the Anglo Bank in September. Then he had also an operating account.

Q. And you traced—you checked the disbursal of the funds in all those accounts, did you?

A. Yes, we did.

Q. Did you submit a written report of your audit?
A. Yes, we did.

Q. And you have been furnished a copy of that, counsel, and what is the date of your audit report?

(Testimony of E. W. Horton.)

You may look at any documents you have in there.

I will show you a copy and ask if that is a copy of your audit report. A. Yes, sir.

Mr. Garrison: Might I ask that this be received in evidence as Plaintiff's Exhibit next in order?

The Court: May be admitted and marked.

The Clerk: Plaintiff's Exhibit 23 admitted and filed in evidence.

(Whereupon Report of Examination December 1, '51 to September 30, '52 was received in evidence and marked Plaintiff's Exhibit No. 23.) [479]

Mr. Garrison: I think it might be helpful if I could pass this up to Your Honor, because I am going to ask him to identify some specific pages.

Q. You have your copy, Mr. Horton?

A. Yes, sir.

Q. And will you turn to page 13. This is entitled "Summary of Premiums Collected, Insurance Written, and Payments on Account for the Period December 1, 1950 to September 30, 1952".

Does this page contain a reflection of the total premium income in the Lotz' office and the payments by him to the different companies?

A. Page 13 applies primarily to the Mid-States Insurance Company and American Fidelity and Casualty Company.

Q. I wonder if you would, in layman's language, just explain for the benefit of His Honor and ourselves what this page 13 shows?

A. Page 13 attempted to show the volume of

(Testimony of E. W. Horton.)

business written by Joe Lotz Insurance Agency for the accounts of Mid-States Insurance Company, American Fidelity and Casualty, to show the premiums collected by that agency for each of those companies, the payments made to the various—to these insurance companies by Joe Lotz, and the balances due to these insurance companies at the dates shown hereon.

Q. Calling your attention to the right hand side of the page, that is the side showing the insurance written, premiums [480] collected, and payments on account of the American Fidelity and Casualty, is it not? A. That is correct.

Q. And the upper half of the page shows the months for the year 1951 and with December 1950 included? A. That's correct.

Q. And it appears under "Insurance Written" column, which is the fourth from the right hand side, that there was only business written in the American Fidelity for the period from January to August, is that correct?

A. No, September, I believe.

Q. Through August, or a total period of eight months? A. Oh, correct.

Q. So that I'm correct, then, am I?

A. Yes, sir.

Q. In saying American Fidelity only issued policies during those eight months?

A. That's correct.

Q. Through the Lotz office. Well now, how

(Testimony of E. W. Horton.)

much was owed the Mid-States Insurance Company by Lotz commencing in the year 1951?

A. At what date in '51, January?

Q. Yes.

A. January 31 we showed \$49,672 as due Mid-States Insurance Company by Joe Lotz. [481]

Q. And were those——

The Court: Pardon me, where is that?

(Witness indicating to the Court.)

Mr. Garrison: Q. I am talking about Mid-States Insurance Company.

The Court: January?

The Witness: January 31.

The Court: I see.

The Witness: There is the balance there.

The Court: I see.

Mr. Garrison: Q. And that was for business written in the year 1950?

A. That is \$49,672 represents the business written in the months of December and January—December 1950 and the month of January, 1951.

Q. And let us include the month of February. I notice you have those set apart at the top of the page. A. Up at the top of the page?

Q. Yes. A. Amount of \$18,464.51.

Q. Total? A. The total, \$62,128.72.

Q. Was that account paid by Lotz to the Mid-States?

A. That was the amount by Joe Lotz to Mid-States Insurance Company on the dates shown,

(Testimony of E. W. Horton.)

which wiped out the balance due [482] Mid-States by Joe Lotz at December 1, 1950.

Q. So I take it that your twelve months' tabulation here shows the two companies starting out on an equal basis?

A. Beginning with December, 1950.

Q. And you run that for a continuous twelve months' period, do you?

A. That is correct.

Q. Now, where do you show the total results of that twelve months' operation on this page 13?

A. Down here where you start with a total of \$317,000. [483]

The Court: Three hundred seventeen?

The Witness: Yes, sir.

Mr. Garrison: Slightly below the middle of the page.

The Court: Oh, I've got it.

Mr. Garrison: Q. And that is what?

A. That represents the premiums collected by Joe Lotz Insurance Company Agency allocated to the premiums for the account of Mid-States Insurance Company to that date.

Q. Now, that means those premiums were collected on policies actually issued by Mid-States?

A. That's correct.

Q. What is the next column?

A. The next column shows the total insurance written to that date of \$540,390.00.

Q. That is just for this twelve-months period, now?

(Testimony of E. W. Horton.)

A. The whole period, December, 1950 through November, 1951.

Q. Now, the next column.

A. Represents the amount paid to Joe Lotz on the insurance written from December, 1950 to November, 1951 of \$122,460.00.

Q. In other words, they wrote \$540,000 collected three hundred and seventeen, and Lotz paid Mid-States one twenty-two? A. That's correct.

Q. That is the round figures of it. Well, now, then let's see what happened to the American Fidelity during the same period. [484]

A. During the same period Joe Lotz collected for the account of American Fidelity and Casualty \$228,000.00.

Mr. Garrison: That is jumping over the Mid-States balance column.

The Court: Yes.

Mr. Garrison: Q. Collected 228 on business that had actually been written by American Fidelity?

A. That's right.

Q. Next column.

A. The next column shows the amount of insurance written during that period of \$255,239.00.

Q. What was paid on their account?

A. There was paid on the account \$231,274.00, and checks were collected by Joe Lotz Insurance Agency and remitted directly to them without going through the cash account of \$34,635.00, representing total payments of approximately \$266,000.00.

Q. Well, this balance column over here shows

(Testimony of E. W. Horton.)

parenthetically \$10,670.00. A. That's right.

Q. What do you mean by that?

A. That is amount due from American Fidelity and Casualty Company.

Q. You mean they overpaid themselves ten thousand? A. That is what it indicates. [485]

Q. And owed Lotz that much as of that time?

A. Yes.

Q. What was the state of the record insofar as the Mid-States account as of that date?

A. At that date Joe Lotz owed Mid-States Insurance Company \$417,929.00.

Q. Now, let me understand a little more clearly what you mean now about this payment on account of \$231,000, collections remitted direct of \$34,000.00?

A. Well, \$231,274.00 represents checks drawn on the trustee account and paid to American Fidelity and Casualty Company. Now, the \$34,635.00 represents collections made from various sub-agents owing to Lotz which were sent directly to American Fidelity, didn't go through the regular cash account of Joe Lotz.

Q. In other words, those collections were not banked by Lotz? A. Correct.

Q. But paid directly to American Fidelity?

A. That's right.

Q. Now, do you know from whom any of those funds came?

A. Well, in analyzing the receipts we developed that of the \$34,635.64, \$10,100.00 was for premiums for the account of Mid-States Insurance Company

(Testimony of E. W. Horton.)

and \$24,832.00 were for premiums for the account of American Fidelity and Casualty Company. [486]

Q. In other words, of that amount, \$10,000 was actually collected on premiums written in the Mid-States Insurance Company? A. That's right.

Q. Is that correct? A. That's correct.

Q. Well, now, I asked you to make an audit of the period commencing with August of 1951 and running through September, October and November to see what happened to the collections and disbursements by Lotz for this critical, so-called critical period of 1951, in August after we had the New York meeting that we have been talking about. Did you make such tabulation?

A. I have here a breakdown of those figures that you asked for.

Q. Let us go through the same columns that we did for the year and tell me what happened in that four-month period with Mr. Lotz' money.

Mr. McKinnon: Pardon me, Mr. Garrison, has the witness a copy of what you are now looking at, or just a list of those figures?

The Witness: This is the only one I have at the present.

Mr. Garrison: Want to look over his shoulder?

Mr. McKinnon: No, no, look at it afterwards.

Mr. Garrison: It will be available. [487]

Mr. Garrison: Q. Can you give us the figures?

A. Yes, sir. For the months of August, September, October and November, 1951, the premiums collected for account of Mid-States by Joe Lotz was

(Testimony of E. W. Horton.)

\$199,319.00. During that same period \$434,391.00 was written.

Q. Four hundred what?

A. Four hundred thirty four thousand, three hundred ninety-one dollars insurance was written by Joe Lotz for Mid-States, and during that period Joe Lotz paid on account to Mid-States \$47,417.00.

Q. All right. Now, what happened in the American Fidelity case?

A. During that period there was a total of \$86-444.00 collected by Joe Lotz for the account of American Fidelity, and there was net cancellations during that period of \$34,708.00 and there was paid on account \$132,311.00, and there were checks collected by Joe Lotz remitted direct of \$34,635.00.

Q. Or a total of—

A. Or a total of approximately \$167,000.00 paid during that period to American Fidelity.

Q. Did you find evidence of a cancellation of a block of business that had been written by the American Fidelity and Casualty Company and the rewriting of that same amount in the Mid-States Insurance Company? [488]

A. I found evidence of that, and it was not recorded in the books at the time we made the audit, so we took it up as an adjustment, \$61,016.00.

Q. That is what appears there in the direct middle of the page?

A. Yes, sir, I have it written here as cancellation by American Fidelity and Casualty Company, rewritten by Mid-States Insurance Company.

(Testimony of E. W. Horton.)

The Court: Take a recess. (Short recess.)

Mr. Garrison: Q. Will you read the last question, please?

(Record read.)

Mr. Garrison: Q. You follow that question, Mr. Horton? A. Yes, sir.

Q. And will you tell us the answer?

A. I thought I answered it. I have it appearing in the middle of the page as cancellation by American Fidelity and Casualty Co rewritten by Mid-States Insurance Company \$61,016.00.

Q. And that computation decreases the American Fidelity and Casualty balance by that much, does it? A. That is correct.

Q. Just the same effect as though that money had been paid them?

A. A reduction in the amount due.

Q. Yes. And it is charged against Mid-States?

A. It's—In other words, that's an amount due from Joe Lotz to Mid-States, that sixty one thousand.

Q. So it increases his debt to Mid-States by the same amount? A. That is correct.

Q. That it credits his account to American Fidelity.

After all this business had been cancelled by Mid-States or allowed to expire, whatever happened to it, and the losses had all been paid and the expenses had been totalled up, did you audit the books of the agency from that standpoint?

A. I don't quite understand.

(Testimony of E. W. Horton.)

Q. Well, I notice here you show in the lower half of the page a total as of September, 1952.

A. Oh, yes. We were requested to bring the account balances from the last audit, which was of November 30, 1951.

Q. And as of that date had the policies all been cancelled or had they expired?

A. As we understood, everything had been cancelled out.

Q. Did you see Plaintiff's Exhibit 15, which is the schedule of premiums written, expenses, commission credit and total loss of the Mid-States Insurance Company?

A. Could I see that?

Q. You're probably noticing this total at the bottom of the line.

A. That is what I am confused about.

Q. Yes. Well, this total was reduced after your schedule was [490] prepared as a result of certain conferences between counsel. What figure do you have as the total on your schedule?

A. I have a balance here at February 28, 1954, of \$298,139.00.

Q. Well, that amount has been reduced now by conference between counsel to \$281,746.00. With that difference is the schedule the same, excepting the other figures which have brought about that reduced amount? I might say that the expenses have been reduced, as you will notice, that were chargeable to certain items.

A. What are the changes?

(Testimony of E. W. Horton.)

Q. And did you verify that schedule with your audit report?

A. Yes, this schedule here picks up from the balance I showed in my audit report of September 30, 1952, showing an amount due to Mid-States Insurance Company of \$270,977.00, and from that figure it picks it up and brings it down to the current balance as shown by the Mid-States Insurance books of \$298,139.00.

Q. And any reduction we have made here would be reducing the amount of the total claim of the Mid-States? A. That is correct.

Q. Now, I asked you previously about these December, January and February items that appear before the line on page 13, and Mr. McKinnon asked me in the recess to have you clarify that a little bit. [491]

A. What we did here was we worked back to establish a balance, or starting point, you might say, as due to Mid-States Insurance Company by Joe Lotz, which we developed as of December 1, 1950 of \$62,128.00. And then we were able to apply specific payments against that so that we came down to a zero balance, which indicated that any insurance written after November 30, 1950, was a new balance.

Q. The purpose of that was to try to strike a starting point for accounting purposes, each company was on an equal footing?

A. That's correct.

Q. And that is the effect of that segregation of those payments? A. That is right.

(Testimony of E. W. Horton.)

Q. The fact is that two of those payments were made in January, February, 1951?

A. That's right.

Q. But they are pulled out to show, as I say, this comparison?

A. That's correct.

Q. Now, did you find in your audit any particular large payments or receipts by the Lotz Agency and payments to the American Fidelity?

A. Yes, in checking the deposits, the receipts to the deposits in the bank statements, we noticed several large items.

Q. I wonder if you would look at this statement of account [492] with the Anglo-California National Bank, Joe Lotz Trustee, and see if you had that record available to you when you made your audit?

A. Yes, I recall this bank statement.

Q. And you're familiar with the bank statement, of course?

A. Yes, I am.

Q. You checked out the deposits and withdrawals that are reflected there?

A. Yes, I did.

Q. Now, what particular amount do you have reference to that you say you observed in that account?

A. Well, we noticed in some of the deposits here in September——

Q. Of what year?

A. '51.

Q. Yes.

A. That there were large sums of money received from Public Service Insurance Company.

Q. As of what date did you find the first one?

A. On September 7 in deposit of \$14,790.00, we

(Testimony of E. W. Horton.)

found a check from the Public Service of \$5,547.25.

Q. And did you find in the records, or was there made available to you, checks from the Public Service Company in that amount?

A. No, we didn't inspect the checks ourselves.

Q. Did you find other deposits after that that had been made [493] in large amounts?

A. Yes, on September 14, the deposit of \$68,811.00 we found an amount included in their deposit of \$67,500.00 indicated to have been received from Public Service Insurance Company.

Q. And did you find where any withdrawals in substantially the same amounts were made shortly after that date?

A. Yes, there was. On that statement you have placed in as an exhibit, I have on page 21 checks to American Fidelity and Casualty Company, and you notice a deposit of September 11 for \$14,790.00; on September 11 the check was written to American Fidelity and Casualty for \$15,000.00.

Q. Fourteen thousand? A. \$15,000.00.

Q. \$15,000. And what was the balance in the account at the time the deposit was made of the Public Service money? A. After the deposit?

Q. Before the deposit. A. \$3,009.00.

Q. And then the fifteen thousand was deposited, and all Public Service money?

A. The fifteen thousand check was drawn on the account, which left them a balance of \$2,433.00.

Q. All right. I notice here September 15 you have a check A-5011 of \$60,000.00.

(Testimony of E. W. Horton.)

A. Well, that was drawn—after the withdrawal of that check [494] of \$60,000.00, there was left in the account about \$5,300.00.

Q. Well, what date was the \$67,000.00 deposit made?

A. \$67,500.00 deposit made on September 14.

Q. And what was the balance in the account before that, or with that deposit?

A. With that deposit it was 66—wait a minute.

Q. Give us the balance before that deposit.

A. The balance before that deposit was \$2,079.00.

Q. Now, did you find that money withdrawn shortly thereafter?

A. The \$60,000.00 check was drawn on September 15.

Q. That is the following day?

A. The following day of the deposit, yes.

Q. This is the check I show you, which is attached as Plaintiff's Exhibit 19.

A. That is the check.

Mr. Garrison: May I have the bank account?

Mr. Garrison: Q. So, as I understand your testimony, the account had \$2,000 did you say, in it?

A. I think that's correct, September 13.

Q. \$2,079. And then the deposit of Public Service was made on the 14th of September.

A. That was \$68,811.

Q. And on the following day that money was withdrawn in the sum of \$60,000?

A. That's correct. [495]

Q. Paid to American Fidelity.

(Testimony of E. W. Horton.)

Mr. Garrison: I will ask that this original statement of account be introduced as Plaintiff's Exhibit next in order.

The Court: Be admitted and marked.

The Clerk: Plaintiff's Exhibit 24 admitted and filed in evidence.

(Whereupon document, bank statement of Joe Lotz' Trustee account was received in evidence and marked Plaintiff's Exhibit No. 24)

Mr. Garrison: Q. Mr. Horton, did you strike a balance of the Lotz books as of any particular date?

A. Well, we prepared a balance sheet at November 30, 1951, so I assume that would be striking a balance. And also we prepared a balance sheet from the books, without verification of the adjustments, as of July 31, 1951.

Q. July 31, 1951? A. Yes, sir.

Q. Did you have a copy of that? I show you the original and from that balance did you determine whether or not the Lotz agency was solvent or insolvent?

A. This balance sheet here gives effect to certain adjustments as of July 31, and I would say from the looks of this——

Mr. Bronson: May I interrupt you a minute? I am thinking that that might call for a conclusion of the witness, if Your Honor please. He has asked about solvency. [496]

The Court: I am anticipating he may indicate "from the looks of this".

Mr. Garrison: Yes.

(Testimony of E. W. Horton.)

Mr. Bronson: Very well.

Mr. Garrison: Q. Don't tell us from the looks of it, tell us from the figures that are on here; his assets were less than his liabilities?

Mr. Bronson: Wait a minute, he said if some adjustments were made, that might have happened afterwards and been reflected back to that date.

Mr. Garrison: We will ask about the adjustments.

Mr. Bronson: I know, but it is still calling for the conclusion of this man if he is insolvent. The record itself will show what it shows, and then you can read that and make up your own mind, and then we would have the power to cross examine this gentleman and find out.

The Court: I quite agree with you, counsel.

Mr. Bronson: Oh, fine.

Mr. Garrison: All right.

Mr. Garrison: Q. Tell us as of that date what were his assets?

A. His total assets of \$182,758.00.

Q. What were his liabilities?

A. Well, his liabilities exceeded his assets by approximately \$79,000.00. [497]

The Court: What were his liabilities?

The Witness: About \$250,000.00.

Mr. Garrison: Q. You made a reference to some adjustments. What were those?

A. There were some adjustments which were made by another firm of independent accountants.

Q. Who was that firm?

(Testimony of E. W. Horton.)

The Court: It wasn't a competitor?

Mr. Garrison: Q. Who was the individual that worked on it? A. Mr. Marks.

Q. The gentleman that is in the courtroom here?

A. That is correct.

Q. On behalf of the defendants?

A. That's correct.

Q. And what were those adjustments?

A. Well, of two kinds. They were picking up some of the audit adjustments we made as of November 30, 1951, together with the adjustments for the equity in unearned premiums as of July 31, 1951.

Q. And were those adjustments made at his request, Mr. Mark's request?

A. Mr. Marks made those himself on the balance sheet.

Q. And you accepted them as he made them?

A. Yes, sir. [498]

Q. And do they increase or decrease the excess of liabilities over assets? You know, as a matter of fact, don't you, whether they increase or decrease?

A. They didn't make a great deal of difference in the——

Q. Well, all right, what is the fact?

A. What it really did, primarily did was decrease some of the equity in unearned premiums from \$76,000.00 to \$67,000.00.

Q. Is that the only change?

A. Well, that is the only major change.

(Testimony of E. W. Horton.)

Mr. Garrison: Cross examine. I will ask that that be received in evidence.

The Court: Be admitted.

Mr. Garrison: As our next exhibit.

The Clerk: Plaintiff's Exhibit 25 admitted and filed in evidence.

(Whereupon document, balance sheet as of July 31, 1951, was received in evidence and marked Plaintiff's Exhibit No. 25.)

Mr. McKinnon: If the Court please, may I ask Mr. Garrison, did you introduce the work sheets Mr. Horton testified from?

Mr. Garrison: No, I didn't, but I will be glad to.

Mr. Garrison: Q. Will you show me those work sheets. That represents, as I take it, the period August, September, October, November, 1951? [499]

A. That is the ones we were discussing.

Mr. Garrison: Ask this be received in evidence as Plaintiff's exhibit.

The Court: Be admitted next in order.

The Clerk: Plaintiff's Exhibit 26 admitted and filed in evidence.

(Whereupon documents, work sheets, were received in evidence and marked Plaintiff's Exhibit No. 26.)

Mr. McKinnon: If the Court please, may I say in advance that we would like the Court's indulgence to permit us to confer during the noon hour for some cross examination of this witness. I lack Mr. Garrison's—

(Testimony of E. W. Horton.)

The Court: I will indicate an answer for what you have in mind.

Mr. McKinnon: Yes, sir.

The Court: When we adjourn today at noon we will adjourn until Monday morning at ten, give everybody a breathing spell. We have been smothered here. If that is agreeable to both sides.

Mr. McKinnon: Very well. I was going to say I lack the fortitude Mr. Garrison possesses in suggesting adjournments as early as eighteen minutes to the hour, so I was going to say I was unable to question him eighteen minutes without further preparation.

The Court: I saw you look at the clock. [500]

Mr. McKinnon: I can put a question or two, if I may, before the noon hour.

Mr. Garrison: Before you do that, Mr. McKinnon, I am entirely in accord with Mr. McKinnon's request as to reviewing these figures, but I do think Your Honor ought to know, and the record should show that Mr. Marks and his associates, the auditors for the defendants, have had full and free access to all of these books and records, that they were in the Chicago office of Mid-States and they were out here, and they have conferred with Mr. Horton so there has been the maximum of collaboration between us up to this point.

Mr. McKinnon: Well, that fact is correct, but if Mr. Garrison insinuates that we are trying to stall fifteen minutes——

Mr. Garrison: No, no, no, no.

(Testimony of E. W. Horton.)

Mr. McKinnon: All right.

Cross Examination

Mr. McKinnon: Q. Mr. Horton, I wish you would describe, please, the state of the books with reference to whether or not at the time of the passage of events the books were fully posted so that one might see, let us say, each month what the state of the accounts were as between the Lotz agency and the various companies that he represented?

The Court: The testimony was every three months. [501]

Mr. McKinnon: Very well, Your Honor has clarified that much better than I even thought it was. I think you very much.

I have not concluded my cross examination, you will be here at the next session?

The Witness: I will.

Mr. McKinnon: Thank you very much.

Mr. Bronson: May I ask, if I can interrupt at this point, that the witness, Smead, be asked to attend Monday and until excused? Mr. Smead. He is the gentleman that is sitting down there in the corner. You intend to remain here, Mr. Smead?

Mr. Smead: Yes, sir.

Mr. Bronson: For next week's session.

Mr. Garrison: You will have no difficulty with Mr. Horton, he loves it here, he is employed.

The Court: You wish to adjourn now, or do you wish to proceed?

Mr. McKinnon: I would be delighted.

The Court: All right. Proceed, gentlemen.

Mr. Garrison: You have finished your cross examination?

Mr. McKinnon: We have interrupted the cross examination until the next session, with the permission of his Honor.

Mr. Garrison: I think if that is the case we had better not introduce another witness, and possibly we had better adjourn. [502]

The Court: All right, take the adjournment until ten o'clock Monday morning.

(Whereupon an adjournment was taken until

10:00 o'clock a.m., Monday, May 10, 1954.)

The Clerk: Mid-States Insurance Company and Anglo California National Bank versus American Fidelity and Casualty Company, further trial.

Mr. Garrison: Mr. Horton, will you resume the stand?

The Clerk: E. W. Horton to the stand, heretofore sworn.

E. W. HORTON

a witness called on behalf of the plaintiff, being previously sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as follows:

Redirect Examination—(Continued)

Mr. Garrison: Q. Mr. Horton, at the conclusion on Friday, just before adjournment, Mr. McKinnon asked the question which I didn't understand because it seemed a little complicated to me, and I asked the Reporter to have it written up,

(Testimony of E. W. Horton.)

which he has done. I would like to read the question again and ask you if you would tell me if you understand it and if you can give the answer:

“Question by Mr. McKinnon: Mr. Horton, I wish you would describe, please, the state of the books with reference to whether or not at the time of the passage of events the books were fully posted so that one might see, let us say, each month what [504] the face of the accounts were as between the Lotz Agency and the various companies that you represented?” Do you understand that question?

A. I think so, sir.

Q. Would you answer it, please?

A. Well, when we first went in there, the General Ledger had not been posted for several months—September, October and November. The General Ledger, as you probably know, is a summation of all transactions from which you prepare the balance sheet and the profit and loss statement.

However, the detailed posting were made daily to the sub-agents' accounts so that you could determine at any given time what was due to or from a sub-agent. And also, the dailies were written up of the amount of insurance by companies so that the detailed transactions were kept up to date in the detailed records, although not posted in summary to the General Ledger for those months.

Q. As I understand it, then, you could by running a tabulation or tape make a computation to determine the amount of money that was owed Mr.

(Testimony of E. W. Horton.)

Lötz from his sub-agents without reference to the General Ledger?

A. You could do that. It would be approximate. You wouldn't know whether the books were in balance. It would give you an approximation.

Q. Give you a figure? [505]

A. Give you a figure.

Q. That would be approximate. You could also determine by looking at the dailies or bordereaux, copies of which were in his office, the amount of the balance he owed the companies that he represented?

A. You would also work up an approximation, which you wouldn't have a control in the general ledger, but you could determine approximately.

Q. And you could do that without reference to the general ledger?

A. That is right. You wouldn't have a clerical balance upon the details of the control account.

Q. So that you could get a figure?

A. That is correct.

Q. You could get a figure that would be approximately correct at any time, representing the amount of monies due him from sub-agents and the amounts he owed the companies?

A. By running the adding machine type.

Q. And you wouldn't have to do a complete audit to accomplish that, to get a practical, approximate figure?

A. The office staff could run the adding machine tape to get the approximation of amounts due to and from.

(Testimony of E. W. Horton.)

Q. I see. And did you make such a computation when you were in there before you completed the audit?

A. We ran a detail of the sub-agents' accounts receivable, [506] and also worked up a detail of amount due to various insurance companies.

Q. So that you did that by this tabulation of bordereaux in the case of the balance due the companies?

A. Well, we did that, and also had the books posted up so that we would get—see how close the detail was to the controlling account.

Q. And how close was it? I just mean generally.

A. Oh, as I recall, about around \$8,000 difference.

Q. And would that have been possible for someone to do that in August of 1951?

A. Oh, yes. The office staff could run that detail.

Q. In the balance sheet that you made up as of July, 1951, what did you find the premiums, receivables, to be due Mr. Lotz?

A. On that revised balance sheet? \$92,832.

Q. I see. Did you make a—prepare a balance sheet as of November 30, 1951?

A. Yes, sir.

Q. I show you a statement and ask you if that is the balance sheet. A. Yes, sir.

Q. What were the premiums receivable as of November 30, 1951? A. \$95,980. [507]

Q. And what was the excess of his liabilities over assets as of that date? A. \$253,539.

(Testimony of E. W. Horton.)

Q. In other words, in that period they had increased from the seventy-nine figure you referred to before to the two hundred fifty-three?

A. That is correct.

Mr. Garrison: I ask that this November balance sheet be received in evidence as Plaintiff's Exhibit next in order.

The Court: It may be admitted and marked.

(Whereupon November Balance Sheet admitted into evidence as Plaintiff's Exhibit No. 27.)

Mr. Garrison: Q. Now, one short further reference to this accounting situation: How long did it take you to complete your audit? I think you testified to that, but I have forgotten what the figure was. Approximately?

A. I was just trying to think. We went in the office of the Joe Lotz Agency around the first week in December, 1951, and I didn't get the report out until April 8th—No, that is the wrong date.

Q. I don't care about the exact date. I just want the approximate time.

A. I think it took us a couple of months.

Q. And that was doing the posting and the over-all job that you have described? [508]

A. That is correct.

Q. And that period of time had no relationship to this procedure that you have just referred to of running your tabulation to show the amounts due companies or amounts of premiums receivable?

A. That was part of our audit.

(Testimony of E. W. Horton.)

Q. Yes, I know; but in reference to the time involved, the running of—the work of running the tabulations, I take it, of the accounts due the companies and the balances due from sub-agents would be a very short period of time?

Mr. Bronson: He hasn't said so, Your Honor. Objection. It is the subject of an answer.

Mr. Garrison: I will ask him.

Mr. Garrison: Q. What would be the period of time necessary to run a tabulation to develop those two figures that we are talking about?

A. I don't recall.

Q. Well, could you give us any estimation?

A. Normally I would say it would take about three or four days to run a tabulation of the accounts receivable.

Q. And the two months that you say were spent there were spent in first posting up the books, in February, then doing your complete audit?

A. That is correct. [509]

Recross Examination

Mr. McKinnon: Q. Mr. Horton, as I understand it, you are saying the books were not posted either with reference to how much was owed by agents to Lotz or with reference to how much Lotz owed the specific companies, correct?

A. The general ledger wasn't posted.

Q. Yes, I understand that. I meant by posting, that is important. Naturally, by going into the entries of Lotz' status, you could derive the data to

(Testimony of E. W. Horton.)

make the postings that you and your accountants did, correct?

A. The summaries, that is correct.

Q. But at the given moment, if at the close of a day, someone wanted to see how much they owed the company, that couldn't be ascertained without further bookkeeping in his office?

A. You would have to run a tape to do that.

Q. When you run a tape, that wouldn't give the result the dignity of a ledger account, would it?

A. It would only give an approximation.

Q. That is right. In other words, you would have to post your books both ways in order to see whether the record was correct of entries with respect to how much Lotz owed companies, correct?

A. That is correct.

Q. The data that you had which you say you could run a tape [510] on wouldn't give a breakdown of agents' balances according to the company for which insurance was written, would it?

A. You could get that from the—the bookkeeping system, they posted the dailies to individual companies and you would get the total from the individual bordereaux.

Q. But you didn't have a breakdown of the companies according—Rather, in respect to a given agent, you wouldn't have a breakdown of companies, would you? That is, if an agent owed Lotz a certain amount of money, you wouldn't be able to determine that without a great deal of bookkeep-

(Testimony of E. W. Horton.)

ing, would you, how much of that money Lotz in turn owed a given company?

Mr. Garrison: Object to the question on the ground as to what a great deal of work might be. It is too indefinite, speculative. A great deal of work to one might not be very much to another.

The Court: This is an expert. He can tell us.

The Witness: The amounts due to each insurance company from each sub-agent, is that what you are trying to get?

Mr. McKinnon: Yes. I am trying to say, perhaps not in the best wording, that when you had ascertained how much was owed to Lotz from a given agent, the data you had to ascertain it did not give it, did it, the amount, the breakdown, as between companies for which insurance was written through that agent?

A. We are speaking of two different things. One, amounts due [511] from sub-agents is only determined in the total amount from a sub-agent.

Q. Yes, that is right.

A. The amounts due to the insurance company was a credit balance in the accounts and we would determine that from the bordereaux by the actual insurance written.

Q. I think that in effect answers my question.

The amounts thus shown to be due from sub-agents to Lotz would be normally subject to confirmation to be reliable, would they not?

A. That is correct.

(Testimony of E. W. Horton.)

Q. As it turned out, the confirmation was badly lacking in very considerable degree, was it not?

A. That is correct.

Mr. McKinnon: If you will pardon me just a moment, Your Honor, I will see whether Mr. Bronson has any questions.

Mr. McKinnon: Q. You referred to the period of time, Mr. Horton, of three or four days as being necessary to do an accounting job a moment ago, in answer to Mr. Garrison's question?

A. That is correct.

Q. How many men would be involved in that labor? How many accountants?

A. I had two men working on that for several days, as I recall. [512]

Mr. McKinnon: I see. That is all the questions.

Mr. Garrison: Step down.

(Witness excused.)

Mr. Garrison: Mr. Lotz, will you come to the stand, please?

JOSEPH P. LOTZ

a defendant herein, called as a witness on behalf of the plaintiff, as an adverse witness under Section 2055 of the Federal Rules of Civil Procedure, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

The Clerk: State your full name and occupation to the Court.

The Witness: Joseph Peter Lotz. I am now in the life insurance business.

(Testimony of Joseph P. Lotz.)

The Clerk: What is your address?

The Witness: 125 Camdon Drive.

The Clerk: In what city?

The Witness: San Francisco.

Mr. Garrison: I am calling Mr. Lotz, if the Court please, as a party defendant in this case and an adverse party to the plaintiff.

Direct Examination

Mr. Garrison: Q. You have been in the courtroom and [513] heard the testimony that has been given? You are the Mr. Lotz that we have been referring to from time to time, are you not?

A. Yes.

Q. And you were an insurance agent of the plaintiff Mid-States Insurance Company through the years 1947 to 1951? A. Yes.

Q. Just keep your voice up just a little bit.

A. All right.

Q. And you represented a number of companies during that period, did you? A. Yes.

Q. And in the years 1949, let's say, what companies did you represent?

A. 1949? Well, I represented the Mid-States, and I had some other companies. The Traders and General, and West American. I can't recall all of them.

Q. And you wrote life as well?

A. Very little.

Q. Other risks? A. Yes.

Q. Fire and casualty, principally?

(Testimony of Joseph P. Lotz.)

A. Yes.

Q. And then, as I understand it, you took on the representation of American Fidelity and Casualty Company in 1951? A. Yes. [514]

Q. Continued your representation in the other companies, did you? A. Yes.

Q. During this period of time?

A. Yes.

Q. It didn't involve any cancellation of any arrangements with others? You simply took on a new company? A. That is right.

Q. Calling your attention to 1951, Mr. Lotz, do you remember the incident of the check being sent to the American Fidelity and Casualty Company and not being honored at the bank?

A. Yes.

Q. And that check was in the sum of \$50,301.88, I believe? A. I think so.

Q. And did you receive from the American Plan or its accountants any letter with reference to that check after it had been returned to them from the Bank not paid (handing document to the witness.)

A. Well, I think this is a letter we received. I don't remember of seeing it.

Q. It is a letter dated August—Pardon me?

A. It is probably correct because I know about the transaction.

Q. The letter is dated August 14, 1951, addressed to Mr. Joe Lotz, Oakland, signed by P. L. Tormina, Chief Accountant? A. Yes. [515]

Q. The letter reads:

(Testimony of Joseph P. Lotz.)

"Dear sir:

"Enclosed please find your check 1670 in the amount of \$50,301.88 returned to you due to insufficient funds. Kindly mail us your check in the amount of \$4.00 to cover the surface charge involved."

That is the check we have been referring to, is it not?

A. Yes.

Mr. Garrison: I ask that this be received in evidence as Plaintiff's Exhibit next in order.

The Court: It may be admitted and marked.

(Whereupon letter referred to above was admitted into evidence and marked Plaintiff's Exhibit No. 28.)

Mr. Garrison: Q. I believe that during this period and for some time prior, Mr. Smead had been one of your employees?

A. Yes.

Q. Ralph L. Smead?

A. Yes.

Q. And when had he gone to work for you? Approximately? I don't mean exactly. In 1950?

A. I think in 1950 sometime.

Q. And do you know what his position was when he first came with you?

A. When he first came with me he was an underwriter and [516] general help to me in most of the operations, advisor. Later on, why, he was made general manager. The dates I can't remember exactly.

Q. All right, I understand. I am not concerned about the dates, anyway.

(Testimony of Joseph P. Lotz.)

But after he had been there a few months he was made general manager?

A. After, I would say, about five or six months.

Q. And as general manager, what were his duties?

A. Well, he had full charge of the same capacity which I would probably have myself if I had the time. He supervised the underwriting in the office, also other duties, and bookkeeping and cancellations, and helped me some with the adjustment of losses, and so forth.

Q. Did he have charge of the handling of the finances?

A. To a degree, yes.

Q. How many bank accounts did you maintain, Mr. Lotz?

A. Well,—

Q. I don't mean in which banks. I mean what type of accounts did you maintain?

A. I had a commercial account and also a trustee account.

Q. And what funds were deposited in the one as compared to the other?

A. My commissions, of course, in all companies, went into the trustee account, and my commercial accounts were monies [517] that we transferred and any other monies that I obtained.

Q. You were familiar with the duties of an insurance agent under the laws of California with respect to trustee funds, were you, at that time?

A. Yes.

Q. And the purpose of having the trustee ac-

(Testimony of Joseph P. Lotz.)

count was to keep the funds of companies, I take it, separated from the funds of your own?

A. That is right.

Q. And you did that, did you?

A. I did that.

Q. Well, now, we have made reference heretofore to the first Public Service reinsurance transaction that you had with the Public Service Company. I believe there was a balance due the American Fidelity and Casualty Company as a result of that transaction, was there not, due from you to the American Plan? A. Yes.

Q. Do you remember how much that was?

A. No.

Q. That was about \$6600, was it not?

A. I think so, yes.

Q. And as I take it, you didn't have the funds with which to make that payment when it came due? At least it wasn't paid, was it? [518]

A. I guess you are probably right.

Q. And do you remember when that first Public Service transaction was completed, approximately?

A. I think it was the middle of the year somewhere.

Q. Of 1951? A. I think so.

Q. And that was shortly before your trip to New York, wasn't it? A. Yes.

Q. So that you then had the balance, an amount due the American Fidelity, just before you went to New York, of the \$50,000 check that was returned not sufficient funds and the \$6600 which was due

(Testimony of Joseph P. Lotz.)

because of the Public Service transaction, is that true? A. I think it is right.

Q. You went to New York in August of 1951, did you not? A. Yes.

Q. And do you recall having any conversation with Mr. Hart, the President of the American Plan Corporation, just before you went to New York?

A. We had several conversations. He insisted upon us coming to New York, so that we went.

Q. And did those conversations include reference to this check that had been returned and the balance due on the Public Service transaction?

A. I don't think there was any reference to it. I don't even remember whether that check was previous to our trip to New York or later.

Q. In any case, you had a conversation with him before you went to New York about the condition of your account with them, didn't you?

A. Yes.

Q. And it had some reference to the fact that you owed them money? A. That is right.

Q. And the payments were not made?

A. And I think the check happened before this, now. Yes, that is right.

Q. So can you give us any of those conversations? Do you recall what was said by you and Mr. Hart regarding this account with them and why it hadn't been paid, and so forth?

A. It is pretty hard for me to give any details because I was very much confused and upset.

(Testimony of Joseph P. Lotz.)

Q. Can you give me any substance of that conversation?

A. The substance of those conversations was that Hart wanted the money.

Q. This was before you went to New York?

A. Yes. And he urged us to come to New York to discuss it, so we went.

Q. And you remember the meeting you had in New York? [520]

A. I remember most of it.

Q. And who all was present?

A. Mr. Hart, Mr. Feller, Mr. Will, Mr. Sudekum, who had different titles, Mr. Smead and myself. I don't know whether anybody else was there or not.

Q. Mr. Feller? A. I mentioned him.

Q. Did you have a general discussion there regarding the condition of your agency at the time?

A. Yes.

Q. And who did most of the talking as between you and Mr. Smead?

A. Well, I was not feeling well. I was unable to talk.

Q. Then the answer—— A. Smead.

Q. Smead did most of the talking and you listened in? A. I listened in.

Q. Did Mr. Smead give Mr. Hart some figures as to the amounts that you owed the Company at that time and the amounts receivable that were owing you?

A. I think he gave a general outline of what

(Testimony of Joseph P. Lotz.)

we had outstanding and the possibility of earned premiums, and so forth.

Q. Did he say that you owed the company that \$250,000?

A. We owed about two hundred forty or fifty thousand dollars at that time, I think. [521]

Q. That was the fact, wasn't it?

A. Yes.

Q. And do you know how much you had coming to you in accounts receivable from your sub-agents?

A. I think we had a formula there wherewith our writings——

Q. No, I am just talking about the accounts receivable due from sub-agents. Do you remember that figure? If you don't, just say so.

A. I don't think I can definitely recall.

Q. Would it refresh your recollection if I told you it was about \$90,000?

A. I think it was in that neighborhood.

Q. All right. Now, was there anything said at that conference as to how you might work out to pay the American Fidelity their balance?

A. I don't think we were too much disturbed about working it out.

Q. No, that wasn't the question.

A. Well, I can't answer the question.

Q. You don't recall that portion of the conversation?

A. I don't recall what formula we had.

Q. Do you recall anything said about the writ-

(Testimony of Joseph P. Lotz.)

ing in another company developing premiums that in turn would be used, use those premiums to pay the American Fidelity balance?

A. Not definitely. [522]

Q. You don't recall? A. No.

Q. You don't want to say it did not occur? You just don't remember it?

A. We had to write in other companies the amount of money.

Q. No, my question now is——

A. (Interposing) Yes, I know what it is, Mr. Garrison.

Q. I am simply asking you if you remember the conversation at that time regarding getting another company and putting business in that company and taking the premiums to pay the American Fidelity off?

A. Well, that may have been mentioned. If I might add something here——

Q. No, at this point I am——

Mr. Bronson: Let him answer it completely. You were careful about interrupting the witnesses when they were under cross examination. I suggest the witness be permitted to make any explanatory statement he wants to.

Mr. Garrison: The witness can make any explanatory statement he wants to, certainly, after I have finished my cross examination. But it seems to me I am entitled to an answer to my questions as I give them.

Mr. Bronson: He answered your question.

(Testimony of Joseph P. Lotz.)

The Court: He answered your question and added that he wanted to say something. [523]

Mr. Garrison: You may explain your answer, but only explain the answer.

Mr. Bronson: Let the Judge give the instructions to the witness, Counsel.

The Witness: I had in my mind some thoughts and plans, but sometimes my mind gets ahead of what is transpiring right there; so if I hesitate in these answers, I am not sure, so I don't like to say yes or no.

Mr. Garrison: You can take all the time you want, Mr. Lotz. No one wants to hurry you.

The Witness: Yes.

Mr. Garrison: Q. My question at the moment has to do with that conversation and your recollection of it. If you haven't any, just say so and we will proceed to another question.

A. Another carrier was discussed, but I can't give too much detail.

Q. All right.

A. Because I was a very——

Q. (Interposing) Was the Mid-States Insurance Company discussed?

A. Yes, Mid-States was mentioned.

Q. As one of the possibilities of a carrier and might take some new writings?

A. Well, here was the point. I would like to emphasize that. [524] I had a contract with Mid-States. There was nothing to do there. I wanted to see the Mid-States anyway.

(Testimony of Joseph P. Lotz.)

Q. And you did then go to Chicago, did you not? A. Yes.

Q. An appointment was made for you by someone? A. Yes, there was.

Q. Did Mr. Hart make it?

A. I don't know. The call was made from there.

Q. And the appointment was made with Mr. Hatfield in Chicago?

A. I think I talked to Mr. Hatfield's secretary myself and told her I would be in there and that I was in New York.

Q. Then you did go to Chicago?

A. What is that?

Q. You did go to Chicago? A. Yes.

Q. And had a meeting with Mr. Hatfield and Mr. Hart—I mean Mr. Titus? A. Yes.

Q. And negotiated a new contract at that time, I believe? A. Improved the contract, yes.

Q. Got some concessions? Got an advance commission? A. Yes.

Q. And the contract was subsequently written up, but the details of it were agreed to at that meeting? [525] A. Yes.

Q. And you returned to Oakland then, I believe?

A. Yes.

Q. And you are familiar, are you not, with the second Public Service transaction which involved the cancellation of their policies? A. Yes.

Q. And the fact is that you did take business from the Public Service Insurance Company, place

(Testimony of Joseph P. Lotz.)

it in the Mid-States Insurance Company, did you not? A. Yes.

Q. Cancelled the Public Service policies? And issued new policies, and then you received certain sums from the Public Service? A. Yes.

Q. Which represented premiums for the unexpired portion of the policies? A. Yes.

Q. And you paid those premiums on account of American Fidelity?

A. The major portion of the money came from Public Service alone, and then possibly some other monies we were collecting, yes.

Q. In other words, you paid the Public Service money plus other collections that were made from other sub-agents and [526] other sources that sums were made to the American Fidelity?

A. Yes.

Q. While this was going on, do you recall a balance coming due to the Mid-States Insurance Company of some \$27,000? A. I think so.

Q. And did you have a conversation with Mr. Hart regarding whether or not Mid-States account should be paid, or do you remember such a conversation?

A. It seems I do. I am not too positive right now.

Q. At any rate, Mr. Hart did give instructions for the Mid-States account to be paid?

A. Did he give them to me or Mr. Smead?

Q. I don't know.

A. I don't know, either.

(Testimony of Joseph P. Lotz.)

Q. But you know that such instructions were given? A. Possibly true.

Q. And that was due in August, I believe, then it didn't get paid actually until October, is that correct? A. That is probably right.

Q. Do you recall Mr. Hart and Mr. Feller coming to Oakland? A. Yes.

Q. And you met with them, did you, in your offices? A. Yes.

Q. Did you have discussions there with them regarding the condition of the affairs in your agency? [527] A. Yes.

Q. Were you present on the occasion when Mr. Hart requested that your bookkeepers make a tab run to develop the amount of balances due from your sub-agents and the amounts due the companies? A. I think I was.

Q. And you did develop those figures, your bookkeepers did develop those figures for Mr. Hart when he was out there in August?

A. I think the details were handled by Mr. Smead. I am sure, although I can't be too definite on it, but it is probably right.

Q. You do recall the work being done and the figures being developed? A. I think so.

Q. Did you have any conversation with Mr. Hart and Mr. Feller when they were out here on that occasion regarding this Public Service transaction that was in prospect? I am not asking you the details of any such conversation. I just simply

(Testimony of Joseph P. Lotz.)

asked you if you recall talking to Mr. Hart and Mr. Feller about that Public Service deal.

A. I can't answer definitely. There is a possibility and I think we probably did, but I don't want to go on record and say that we did.

I would like to add one more point: I was in a very bad [528] nervous condition at that time, so some of these answers I don't know due to the stress I had. And I was facing a couple of operations and worry. Mr. Smead handled most of these things. It may have been discussed at that time, but I am unable to mention specific details.

Q. I wasn't asking about specific details. I just wanted to know if you recall.

Were you present at any time when Mr. Smead discussed the Public Service transaction with Mr. Hart and Mr. Feller?

A. That is about the same question.

Q. Well, I will withdraw the question for the moment and come back to it later.

A. Yes.

Q. You had a teletype machine, receiving and sending unit in your office?

A. Yes.

Q. And you received and sent a number of teletype messages to Mr. Hart in New York during the months of August and September, 1951, did you not?

A. Yes.

Q. I will show you a series of sheets here and ask you if you can identify those as being transcripts of those teletype messages between your office and Mr. Hart's office, and you and Mr. Hart and Mr. Smead and Mr. Hart? I don't want to

(Testimony of Joseph P. Lotz.)

bother you with each and every message, but if you will just [529] look through those to determine if they are familiar to you. A. Yes.

Q. As being teletype messages that came to your office?

A. This refreshes me that we discussed them.

Q. And what is your answer now with respect to discussing with Mr. Hart and Mr. Feller when they were out here in Oakland in your office the Public Service deal?

A. Well, the answer is that they were discussed, yes.

Q. All right. And when these teletype messages came in and were sent out, did you on each day as you came in and out of the office, look at them to see what messages had been received or sent? Not every one, but I mean was that your custom as you went about your office to check these teletypes when they came in?

A. No, I did not check them much. That deal was completely in Mr. Smead's hands. The prime reason was that I was getting pretty well unstrung with this thing and I threw it all into his lap.

Mr. Garrison: I neglected to offer that. I will ask that these teletypes be received in evidence as Plaintiff's Exhibit next in order.

The Court: They may be admitted and marked.

(Whereupon teletype messages referred to were admitted and marked in evidence as Plaintiff's Exhibit No. 29.) [530]

Mr. Garrison: Q. I notice, Mr. Lotz, that a

(Testimony of Joseph P. Lotz.)

number of these messages were actually sent by you. You recall sending some?

A. They weren't sent by me. They were sent by Mr. Smead. I had nothing to do with them. He signed my name.

Q. I notice a number he signed his own name and on a number your name appears.

A. I know, but they were still sent by him.

Q. And you discussed them from time to time with him, however, I assume? A. Yes.

Q. And were generally familiar with what went on? A. That is right.

Q. Sir? A. Yes.

Q. Did you actually receive the money from the Public Service Company yourself or did someone else receive that when the payments were made?

A. I was away at the time. The whole thing involved these checks, I think, most of them, at least, were handled by our bookkeeping department.

Q. Did you see them before they were deposited in the bank? A. I may have seen one——

Q. Referring now to Plaintiff's Exhibit 5.

A. I may have seen one of those, but I didn't see them all. [531]

Q. You knew they were due and did come in, did you?

A. These had the stamp. They were handled by our Bookkeeping Department.

Q. You would know that those sums were due from the Public Service and did come in?

(Testimony of Joseph P. Lotz.)

A. I knew what was going on, but I wasn't in Oakland at the time.

Q. I see. You didn't personally handle it?

A. No.

Q. And you knew they had been deposited in your Trustee Account? A. Right.

Q. I see in the checks, Plaintiff's Exhibit 19, a series of checks dated September and October of 1951, made payable to American Fidelity and Casualty Company, and they seem to bear your signature. A. Yes.

Q. Is that in fact your signature?

A. Well, this first is mine. These here are signed by Smead. And this is my son. This is mine. There are two of them. This is not mine. That is mine. Four of these checks are my signature.

Q. So that your son had authority to sign checks on this Trustee Account?

A. In combination with Mr. Smead. [532]

Q. And did Mr. Smead have authority to sign checks on the Trustee Account? A. Yes.

Q. And you signed some if you were present, and if not, they would sign them? A. Yes.

Q. You did know, however, those payments were made out of that Trustee Account with Public Service funds to the American Fidelity and Casualty Company?

A. I did when I returned from my trip, yes.

Q. Did you know the American Fidelity maintained a bank account over there in Oakland in the Central Bank? A. Yes.

(Testimony of Joseph P. Lotz.)

Q. And that these deposits were in the account, were made in that account in that bank?

A. Yes.

Q. Now, when Mr. Hart and Mr. Feller were out here and when this Public Service re-write was started, did they give you or Mr. Smead in your presence any instructions about what should be done with the monies when they came in?

A. I think that was discussed with Mr. Smead and Mr. Hart, and possibly I was there, but again my memory is not too good just what was said.

Q. I am not interested in the words or identical details.

A. We were to have another account there in favor of the [533] American Fidelity, and Mr. Smead was to transfer the money into that account instead of sending it to New York.

Q. That was the conversation, the substance of it?

A. Yes.

Q. I notice this letter that is signed by you and addressed to Mr. Hart, or rather to the American Plan Corporation, and having the effect of terminating your agency, copy of which I will show you. I don't see the exhibit number. Dated August 22, 1951. Is that your signature?

A. Yes.

Q. Did you dictate that letter?

Mr. Bronson: What is the exhibit number?

Mr. Garrison: I can't lay my hands on it at the moment.

Mr. Bronson: There are some in the Clerk's desk. Is that a defendant's exhibit?

(Testimony of Joseph P. Lotz.)

Mr. Garrison: Q. Do you recall the letter that I am referring to?

A. Well, it is my signature.

Mr. Garrison: I will show this to counsel.

Mr. Bronson: May I take a look at it?

Mr. Garrison: (Handing document to Mr. Bronson).

Mr. Garrison: Q. Did you dictate that letter?

A. I don't know.

Q. The letter is on the American Fidelity and Casualty Company stationery. [534]

A. It is on the—It is on my stationery.

Q. It is on your stationery, dated August 22, 1951, addressed to American Plan Corporation, New York:

“Gentlemen: Pursuant to my discussion with your Mr. Hart in New York on August 13, 1951, and particularly in view of your inability to comply with my request for a prepay commission, I hereby terminate my agency agreement with American Fidelity and Casualty Company, effective immediately, and trust that you will signify on the copy of this letter your acceptance of the immediate termination notwithstanding the 30-day notice prescribed in the agreement.

“Yours very truly, Joe Lotz.”

Then below it, it says:

“Agreed”, and then “American Plan Corporation, Mark M. Hart, President.”

Do you remember signing that?

A. I don't even remember signing it.

(Testimony of Joseph P. Lotz.)

Q. Do you recall sending it?

A. But it has my signature so it must have happened, but I don't know—I don't know whether I concocted that letter myself or was helped on it. I wish I did, but I don't.

Mr. Garrison: I will ask that this be received in evidence as Plaintiff's Exhibit next in order.

The Court: It may be admitted and marked.

(Whereupon letter referred to above from Lotz to American Plan Corporation, dated August 22nd, 1951, received and marked in evidence as Plaintiff's Exhibit No. 30.)

Mr. Garrison: Q. You don't have any recollection, then, as to when you signed it or where it was handed to you or when you first saw it?

A. I don't remember the exact incident.

Q. Do you remember when Mr. Hart and Mr. Feller left Oakland, and met you at the Central Bank at Oakland on the morning of their departure, you and Mr. Smead? A. Yes.

Q. Do you recall that occasion? A. Yes.

Q. And you at that time, I believe, were handed the contracts or contract that has been referred to in this case as Plaintiff's Exhibit No. 12? Do you remember that contract (Handing document to the witness)? A. Yes.

Q. Do you remember the morning when——

A. (Interposing) Yes. I don't remember the date, but I remember that morning.

Q. And this contract was handed to you by Mr. Hart, was it? A. Yes. [536]

(Testimony of Joseph P. Lotz.)

Q. Then when did you sign it? On that day, or some other date?

A. I think it was signed right there, although I am not too positive, but it seemed to me we signed it.

Q. That morning? A. I think so.

Q. By both you and Mr. Smead?

A. Yes.

Q. And this is the contract that designates Mr. Smead as having supreme authority over the financial affairs of the American Fidelity and Casualty Company? A. That is right.

Q. And do you remember his handing Mr. Smead a separate envelope on that same occasion?

A. I did not see that. I knew nothing of it.

Q. Did you ever see it after——

A. No.

Q. After they left?

A. I never saw it after that. I never knew anything about it. I don't even know how I found out about it, but I never knew about it for a long time.

Q. I show you Plaintiff's Exhibit 18, which is the letter on American Plan Corporation stationery of August 17th, addressed to Ralph L. Smead, and signed "Mark M. Hart", and see if looking at that refreshes your recollection as having [537] ever seen it? A. No.

Q. Sir?

A. I don't recall ever seeing this letter.

Q. Didn't Mr. Smead tell you about it?

A. No.

(Testimony of Joseph P. Lotz.)

Q. After they left?

A. I never knew about it until recently. I never knew about it. That is absolutely something that I knew nothing about.

Q. This is the letter that offers Mr. Smead \$1,000?

A. Yes. I never saw that letter before.

Q. You didn't know that Mr. Smead called Mr. Hart in Los Angeles and repudiated the proposition entirely? A. No.

Q. He didn't take you into his confidence on that? A. No.

Q. And in this contract that I have been—that I have just shown you, that was signed there at the Bank that morning, which designated Mr. Smead as our agent with supreme authority over their financial affairs, you knew that that designation was made by them that morning? A. Yes.

Q. And you were agreeable, were you, that Mr. Smead act as their agent under that contract?

A. Yes. [538]

Q. Well, after they left did you receive frequent phone calls from them and telegrams and teletype messages? A. Yes.

Q. And those messages have been read here. I won't—you heard them read? A. Yes.

Q. I won't burden you with them. What effect did the designation Mr. Hart made have on you as an individual?

A. That is why my memory is bad. I wasn't normal. I was worried about the matter, about get-

(Testimony of Joseph P. Lotz.)

ting this money paid, so we were trying to plan, think out some way of doing it.

Q. Well, when he threatened to take the matter up with officials of the insurance commissioner, did that have an effect upon you?

A. Yes, it did.

Q. And did you do things under compulsion of those threats that you might otherwise not have done?

Mr. Bronson: I object to that. It is difficult—just a moment——

The Court: Change the form of the question. Objection is sustained.

Mr. Garrison: Q. In any event, the threat that he made did affect you, did it, Mr. Lotz?

A. That was a cause of great worry to me, yes, so I was pretty much not normal. I was worried about bills. I have been [539] all my life. I wanted to get this thing out of the way, and we had a plan.

Q. Do you remember when Mr. Hatfield came out?

A. Yes.

Q. And had some meetings with him, did you not?

A. Yes.

Q. And that was somewhat after the time Mr. Hart and Mr. Feller left?

A. Yes.

Q. As a matter of fact, that was after their account got paid in full, wasn't it? After the American Fidelity account got paid in full?

A. I think it was, yes.

Q. And do you remember the occasion when you

(Testimony of Joseph P. Lotz.)

drove Mr. Hatfield over to see the insurance department? A. Yes.

Q. And you stopped at a drive-in to have a bite of lunch?

A. I think this conversation happened in my car. I don't remember the circumstances at the drive-in, but I think it all happened in my car.

Q. Will you tell us what it was you told Mr. Hatfield on that day? Whether it was in the car or getting a cup of coffee wouldn't make any difference?

A. Do you want me to tell the conversation, what happened?

Q. The best you can recall. [540]

A. I had been taking Mr. Hatfield over to the insurance department for a number of days. I don't remember, a week or two we went over there every afternoon or so. What we were trying to do in that insurance department, we were trying to get a new setup on rates. I would wait for Mr. Hatfield until he came down, and some days we had a ray of hope that we might get better rates. Other days it was depressing.

So I guess this was the day they made their final decision. This all was during the time when I was still employed by the Mid-States at a salary of about \$900 and something a month to help get this thing in more or less shape, and when we had a tentative agreement to possibly work this out.

Q. I am just interested in the conversation between you and Mr. Hatfield.

(Testimony of Joseph P. Lotz.)

A. All right. Mr. Hatfield came to the car and he said, "Well, the answer was no. We can't get an adjustment of rates."

We were both pretty low, and I was very low, and Hatfield sort of reprimanded me for not taking him into the full confidence, and so forth, and I made some of those statements which I mentioned the other day.

Q. He told you he lost some confidence in you?

A. Yes, because I should have told him more about this, because he and I were pretty understanding of each other all the time. And I drew a conclusion there which I had no right to say, and I said, "Hart must have known about this", or something [541] like that.

That was about the main—. Then that got him excited, so he called Mr. Titus.

Q. On that occasion didn't you make some reference to the Public Service rewrite?

A. I may have, but I can't recall it.

Q. Did you tell him the premiums you got from Public Service had been used to pay American Fidelity?

A. I don't know.

Q. Did you say all collections had gone to American Fidelity and only one payment to the Mid-States?

A. I can't answer that.

Q. Did you tell him that when you got all through with that a \$61,000 balance that was owed American Fidelity was carried and present on the books of Mid-States?

A. Would you repeat that question?

(Testimony of Joseph P. Lotz.)

Q. Well, did you tell him in the conversation anything about taking this \$61,000 worth of business off the books of the American Fidelity and putting it on the Mid-States books?

A. I don't remember that.

Q. You don't recall?

A. I don't think I did.

Q. You don't think you did. Well, do you remember going back after that trip and getting hold of Mr. Smead?

A. Yes. [542]

Q. And Mr. Hatfield recounted, did he, with Mr. Smead what you had told him?

A. Yes.

Q. And reviewed the whole past in some considerable detail, didn't he?

A. Yes.

Q. And you concurred in what Mr. Hatfield said?

A. I think I did to most of it.

Q. Yes. And then you say Mr. Hatfield called his principals in Chicago?

A. Yes.

Q. I believe that disturbed you a little bit about his calling Mr. Titus, didn't it? Didn't you protest that and ask him not to do that, or hope he wouldn't do it?

A. I think I did.

Q. And why were you so concerned about his telling Mr. Titus?

A. Because I thought we could work this thing out. I thought the thing would readjust itself.

The Court: Take a recess.

(Short recess.)

Mr. Garrison: Q. Mr. Lotz, you made a refer-

(Testimony of Joseph P. Lotz.)

ence before the recess to, I think you said, being on a salary with Mid-States? A. Yes.

Q. Do you have reference to the proposal that you made [543] November 27th to Mr. Hatfield, which is Plaintiff's Exhibit 6, in which you say that, "I have limited my drawing account to a maximum \$600 a month and also limited my travel and entertainment expenses to a maximum of \$350 a month"? Is that the arrangement you had reference to?

A. Yes. I limited it—. Can I amplify that?

Q. Yes.

A. That was drawn up more or less by Mr. Oldberg, and it is an agreement, the continuation of it, I was to draw \$600 a month and \$350 a month for expenses, that's right.

Q. This letter of November 27th was sent to Mr. Hatfield as a proposal by you as to how you were going to continue to operate your office, wasn't it? A. Yes.

Q. And under this proposal you were to continue functioning as a general agent?

A. Very limited, though. Very limited.

Q. And the withdrawals referred to here were withdrawals by you from your own funds, weren't they? A. That's right.

Q. So that it isn't accurate, is it, to say you were on any salary from Mid-States? You mean you proposed to pay yourself out of your own general agency income this money?

A. I was being paid. I had no right to write a

(Testimony of Joseph P. Lotz.)

check any more at that time. Everything was taken away from me. [544]

Q. Under this proposal you were contemplating you would pay yourself out of the general operation \$600 salary and \$350 expenses, is that correct? A. Well——

Mr. Bronson: Doesn't the document speak for itself?

The Witness: A. This thing——

Mr. Bronson: Go ahead.

A. This thing was submitted to me and I signed as though I wrote it. That was the agreement.

Mr. Garrison: Q. Pardon me. It was in the form of a proposal to Mr. Hatfield?

A. Yes.

Q. And it was never accepted and didn't ever come into actual existence, did it?

A. Yes, they paid me \$600 and \$350 for a month or so.

Q. You mean you withdrew that from your general agency?

A. The checks were handed to me. I was paid that.

Q. I see. At any rate, in connection with the phone call to Mr. Titus, you did ask Mr. Hatfield if he couldn't put that off or not make it?

A. Yes.

Q. And do you remember after he said no, he would have to call Mr. Titus and report what you had told him—— A. Yes.

(Testimony of Joseph P. Lotz.)

Q. —he did call Mr. Titus, didn't he? [545]

A. I think he did.

Q. Do you remember, then, after that, his asking you and Mr. Smead if you would write out statements of the facts you had given him?

A. Yes.

Q. And do you remember Mr. Smead writing out his statement?

A. Yes, sir, I remember Mr. Smead writing.

Q. And he wrote it there in this place of business, didn't he? A. Yes.

Q. And that is Plaintiff's Exhibit 11. Do you recall that? You have seen it many times?

A. Yes.

Q. Were you there in your place of business during that afternoon and evening?

A. I was there, I think, in the evening. In the evening, I think.

Q. Observe Mr. Smead's writing it?

A. Well, I was trying to write one out myself and I observed he was writing, yes.

Q. And you didn't get yours completed, did you? A. No.

Q. But I believe you met in your lawyer's office next day with this statement and Mr. Smead and Mr. Hatfield and Mr. Titus?

A. We were supposed to meet there next morning, and I think this statement that we made that night was really supposed to [546] be written in Mr. Mead's office. We had an appointment for next

(Testimony of Joseph P. Lotz.)

morning, and I don't think any appointment was kept.

Q. You met there in the evening instead?

A. Mr. Mead was supposed to check the statements to see if they were all right for us to go ahead. That is the way my memory is on it now. That is the best I can remember of that.

Q. That's good. And you met that evening instead of in the morning in Mr. Mead's office?

A. We met——

Q. And the meeting—. Wasn't it in the evening you went to Mr. Mead's office?

A. Again, I don't know.

Q. At any rate you all did meet there at some time shortly after the December 5th or 6th when Mr. Smead wrote this out? A. Yes.

Q. And the document was signed by you on that occasion? A. Yes.

Q. And the notary, Mr. Mead, acknowledged your signature and Mr. Smead's signature?

A. Yes.

Q. As a matter of fact, Mr. Smead didn't sign it until that occasion in Mr. Mead's office, did he?

A. I think that is correct.

Q. And I notice in this statement there are a few changes which were made and which were initialed by you and Mr. Smead. [547] Those were made thereon that occasion in Mr. Mead's office?

A. I don't know.

Q. Well, the document was read over on that occasion by Mr. Mead, wasn't it, and discussed?

(Testimony of Joseph P. Lotz.)

A. I think it was.

Q. And the changes that were made were made there at that time? A. Yes.

Q. And that was all done before it was signed by you or Mr. Smead and before the notary acknowledged the signature?

Mr. Bronson: We will object to the second question being asked before the first one was answered. There was no answer to that at all and there is no way for this record to indicate, unless the reporter saw something or heard something that I didn't.

The Court: Read the last three questions and answers.

(Last three questions and answers read by the reporter.)

Mr. Garrison: Q. Can you answer that?

A. Well, I think they were.

Q. Do you remember the execution of Plaintiff's Exhibit 12 and Plaintiff's Exhibit 13 and Plaintiff's Exhibit 22, being the supplements that Mr. Smead made to his statement on the second and third day following its completion?

A. I don't remember this part over here about the statement. [548]

Q. Do you remember Mr. Smead making up this supplementary statement to his original statement?

A. I remember him writing an addition.

Mr. Bronson: I can't hear the witness.

The Court: "I remember him writing an addition."

(Testimony of Joseph P. Lotz.)

The Witness: A. I remember him writing an addition. He wrote about ten pages there, I think.

Mr. Garrison: Q. That was the principal statement and he supplemented it next day?

A. Yes.

Q. And is that the supplement he wrote out, do you know?

A. That is his handwriting, yes.

Q. You saw it on that occasion when he completed it? A. Yes.

Q. Certainly. And do you remember the one he wrote on the 8th, the following day (handing document to the witness)? A. Yes.

Q. You remember that? A. Yes.

Q. Now, you say you didn't get the statement completed that night, but Mr. Smead completed his, is that correct?

A. I think that is correct, yes.

Q. And after reading over Mr. Smead's statement, you yourself wrote out a supplement to his statement, I believe?

A. I wrote out—can I amplify that? [549]

Q. Certainly. Just answer my question first.

A. Yes.

Q. Did you write out a supplement to his statement? A. Yes.

Q. And when did you do that?

A. I don't—I think this is the additional statement that I wrote out at the insistence of Mr. Titus. If this is what I think it is, it is something I had to bring to him in Los Angeles.

(Testimony of Joseph P. Lotz.)

Q. Yes. A. I think this is the one.

Q. Do you want to refresh your memory by looking at it?

A. One statement here that I would like——

Q. (Interposing) I am not talking about the details of it now.

A. Yes. It is about that \$1000. I told you before I didn't know about that, and here I've got that in writing.

Q. That is right.

A. That is about right.

Q. That is dated December—. Actually, it doesn't have any date on it. It simply refers to Mr. Smead's statement of December 6.

A. Yes. It was in December.

Mr. Garrison: I ask that this be received in evidence as Plaintiff's Exhibit next in order. [550]

The Court: It may be admitted and marked.

(Whereupon Statement dated December 7, 1951, was admitted into Evidence as Plaintiff's Exhibit No. 31.)

Mr. Garrison: Oh, yes, I notice under your signature there appears "12/7/51". It was folded over.

A. Oh, yes.

Q. That is the date?

A. In December, yes.

Q. Just right after Mr. Smead's statement?

A. Yes.

Mr. Garrison: I would like to read this if I may, Your Honor:

"On thinking over the statement of December 6,

(Testimony of Joseph P. Lotz.)

1951, made by Mr. R. Smead, which I also signed, I feel that I should add the following to it as a supplement.

“Mr. Smead was called in at the Palmer House in Chicago, but I do not remember him discussing the Public Service transaction and I did not discuss this with Mr. Hatfield during my visit with him.

“I also want it known that I was under extreme pressure from Mr. Hart and also Mr. Hatfield, and I agreed upon a new contract with Mid-States. I [551] telephoned from the Palmer House to Mr. Sudekum of the American Plan and advised that the contract was completed.

“As I recall, I told him the commission terms of the contract.

“I also wish to state that I had no knowledge of the letter given to Mr. Smead by Mr. Hart or that he had been offered \$1,000 until December 6, 1951.

“I did not discuss the Public Service deal with Mr. Hatfield until after it was completed.

“I always left the operation of the office to Mr. Smead and followed his advice. Mid-States was paid on the risk with the Public Service by me before they knew about it.

“I also was advised by Mr. Hart not to contact Dick Cass while in Chicago because Mr. Cass might contact Mid-States as he might be friendly to them.

“Signed, Joe Lotz, 12/7/51”

Mr. Garrison: Q. As I understood you to say, where were you when you wrote this out?

(Testimony of Joseph P. Lotz.)

A. I wrote that out in my office and I took it to Mr. Oldberg's home in Santa Monica on Twenty-second Street—I think 219 Twenty-second Street, as I remember the address—and I handed it to him at the door there.

They were there getting ready for dinner. That is all [552] there was to it. There was no conversation at all, which was implied previously. I just handed him the paper and that was it.

Q. Mr. Titus and Mr. Hatfield were in Santa Monica?

A. They were there, and there was another vice-president, and there was another vice-president, and Carl Oldberg and Mr. Hatfield I think were there.

Q. And you carried this with you from Oakland to Santa Monica? A. I brought that.

Q. Were they in Santa Monica when you wrote it out, so far as you know?

A. I wrote it in my office, and they went from Oakland down there. I don't know whether they were there.

Q. You had gone down there, at least, to make some collections from some of your accounts?

A. Yes. I was supposed to be down there.

Q. Who was present when you wrote this out? Anyone besides yourself?

A. I don't know whether Mr. Smead was with me or not, but I don't think—if he wasn't, I don't think anybody else was.

Q. Did Mr. Titus ask you to make out some supplement to Mr. Smead's statement?

(Testimony of Joseph P. Lotz.)

A. Yes. He wasn't satisfied with what I wrote. He wanted some more and that is what I gave him, an additional statement.

Q. And it is a fact that Mr. Hart told you not to contact [553] Mr. Cass when you were in New York? A. Yes.

Q. Mr. Cass was a former employee of Mid-States? A. Yes.

Q. And also a former employee of American Fidelity?

A. I don't know whether he is with them yet or not, but he was with American Fidelity.

Q. At that time? A. I think so.

Q. And did he tell you that he was afraid Mr. Cass might be friendly with Mid-States?

A. He mentioned that, yes.

Q. And that was in the meeting in New York?

A. Yes.

Q. And he also told you when you were in Chicago not to disclose his part in any of these plans—Mr. Hart told you that?

A. I don't think he did specifically, no. No.

Q. He just told you not to see Mr. Cass?

A. Not to see Mr. Cass. Which I attached no significance to at that time, because that was just something that came up incidental to, I said, "I am going to stop to see my friend, Dick Cass", and he said, "I don't think I would see him", and there was no specific significance to that. I don't know what bearing that has myself. [554]

(Testimony of Joseph P. Lotz.)

Q. You mean there is no significance to you about his suggestion? A. Yes.

Q. That, of course, is something others might have attached significance to? A. Yes.

Q. When Mr. Smead made his statement and you made your supplement and he made a statement, you and he collaborated with each other, didn't you, in discussion as to what would go into that statement and what was said, and so on?

I mean by collaborate, you exchanged opinions and views and discussed it back and forth?

A. I was very much influenced by Ralph's point of view because of my mental condition at that time. I wasn't too much good on a good equilibrium basis with this worry and other things, physical conditions.

Q. Well, by this time the pressure from Mr. Hart had been removed because he had been paid, so you weren't under any pressure at that time, were you?

A. Yes, I was under pressure by the company.

Q. Well, the answer is that you and Mr. Smead talked back and forth between each other as to making out these statements, didn't you? You and Mr. Smead discussed them? A. Yes.

Q. You remember coming into my office, Mr. Lotz, don't you? [555] A. Yes.

Q. And do you remember who was present?

A. I think Mr. Mead and Mr. Smead.

Q. Mr. Titus?

A. I don't remember if he was there.

(Testimony of Joseph P. Lotz.)

Q. And we had a general discussion there that morning on all of these events? A. Yes.

Q. And I asked a number of questions of both Mr. Smead and yourself about the statements and you answered them, didn't I? A. Yes.

Q. And you told me in great detail, both you and Mr. Smead, all of the events of the preceding two or three months, about the New York meeting and about the Public Service cancellation, and the paying of money on that account, didn't you?

A. I think we did, yes.

Q. And then after we talked about it for three quarters of an hour or so I called in my secretary and dictated this Plaintiff's Exhibit No. 20, consisting of four and one-half pages of close, single-spaced material (handing document to the witness)?

A. This is a statement by Mr. Smead. You don't have my signature on that, do you?

Q. The particular copy that you have in your hand was signed by Mr. Smead, but there is also a copy, another document, which [556] was signed by you. A. Do I mention in that——

Q. (Interposing: I show you photostatic copy of another draft of the same document.

A. Yes.

Q. And you will see it bears your signature.

A. Is this the same thing?

Q. That is exactly the same. I am not asking you to answer as to all the details in the document now, Mr. Lotz. I am just asking you if that is the document I dictated that day to my secretary?

(Testimony of Joseph P. Lotz.)

A. Yes, I think this is about it. But today some of those points——

Q. I am not asking you about points at the moment. A. All right.

Q. I am asking you about this document.

A. All right.

Q. And it was signed by both you and Mr. Smead afterward? A. That is right.

Q. She was out transcribing it for some half-hour, was she not, after it was dictated?

A. I think so.

Q. Did we wait there in the room, and have further discussion on the subject?

A. Yes. [557]

Q. When she returned with this she had a number of copies, did she not? A. Yes.

Q. And I read this document out loud to all there in the room, didn't I? A. Yes.

Q. And each person had a copy in his hand and followed me as I read? Do you remember that?

A. Yes.

Q. And we came to page 3 and we found that there were a number of places where changes were made by you and Mr. Smead, did we not?

A. Right.

Q. Is that true? A. I think so.

Q. And when I would come to a place—as an example, on the top of the page I had dictated “Los Angeles” and the correct town was Oakland as being the place where the conference was held,

(Testimony of Joseph P. Lotz.)

and I was stopped and advised it wasn't Los Angeles but it was Oakland? A. Yes.

Q. And I thereupon made the correction in ink, did I not?

A. (Nodding in the affirmative.)

Q. And we went all through the document in the same way, and on page 3 we made actually four changes? [558]

A. Yes. What is the date of that?

Q. This is not dated. A. Oh.

Q. It was in December, do you remember?

A. Yes. 1951?

Q. 1951, yes. And when we came to page 4 we found the name of Smead and Hart had been transposed, and it was called to my attention and we made that change at that time in ink.

A. Yes. [559]

Q. In fact, I believe Mr. Smead made that correction. Did you see that?

A. Yes, I see it.

Q. When we got to Page 5 we found that also I thought that Mr. Hart had teletyped, and it was called to my attention he had telephoned, and that change was made by Mr. Smead, was it not?

A. (No audible response)

Q. When, after each of the corrections were noted, after the change had been made, I asked each of you, Mr. Smead and yourself, if you wouldn't initial the margin where the change was interposed and you did so initial it?

A. That is my signature there, yes.

(Testimony of Joseph P. Lotz.)

Q. Yes, sir. And when we finished with the changes, you were asked if that represented a correct statement of the facts and everybody said yes, it did, isn't that correct? A. Yes.

Q. By the way, Mr. Lotz, I believe you kept as part of the personal records, separate and apart from the books and accounts of the Agency, a black diary book that had been given you by J. A. Berger, Inc. A. Yes.

Q. Do you remember that book? A. Yes.

Q. And you kept certain records in that book as to [560] materials that were received and as to monies that were received and monies that were paid and to whom paid? A. Yes.

Q. Do you still have that book?

A. I think the records I had were probably taken by Mid-States. Did you folks get it?

Q. I don't recall. I don't know whether it was kept in the office or if you still had it. It was something you carried personally, wasn't it?

A. In my pocket?

Q. Yes. Do you recall where it is now?

A. Are you referring to a book where I kept the record of my account as we brought it down into companies?

Q. Company balances and premium income due from agents. Balances due from sub-agents.

A. I might have that book somewhere.

Q. As a matter of fact, you sort of kept that up

(Testimony of Joseph P. Lotz.)

to date, didn't you, so that you had a record in your pocket as to what premiums had been written and how much in all the companies?

A. I think Mr. Smead was putting some marks in that book. A record of those deposits. Is that what you mean?

Q. Yes. Balances due companies, and how much deposited and from what account, and so forth.

A. Yes.

Q. So that you kept a personal record outside of the [561] accounting procedure in the office, kept a personal record of the state of your agency, didn't you?

A. I kept a record at this particular time on how their account was reducing, mostly with the American Plan.

Q. In other words, you were recording the payments that were being made on the American Plan Account? A. Yes.

Q. So that each time a deposit went into their account in the Central Bank you noted it in your black book?

A. I wanted to see it shrink. I was keeping a record, yes.

Q. That was because of your anxiety to get that account paid? A. Yes.

Q. By the way, this rewrite of the business of the American Fidelity and Casualty Company that occurred, \$61,000 that was? Will you answer aud-

(Testimony of Joseph P. Lotz.)

ibly? The Reporter must get it. You shake your head, but he can't see it. A. All right.

Q. And that resulted as a transaction to wipe out the balance due them after these other cash payments had been made, I take it?

A. That entire transaction was handled by Mr. Smead, and I was away. I can't give you too much information on that, only that it was turned over to Mr. Smead, and Mr. Hart and [562] Hatfield handled that.

Q. You knew at the time, didn't you, that every one of them had already paid their premiums for that business, didn't you?

A. I didn't know that all of them was paid, but I knew that most of them had, yes.

Q. And you knew that you couldn't go back to those same assureds and collect that premium twice?

A. No.

Q. And that you didn't have any money at that time?

A. I would like to make a remark here. Something has been disregarded all the way through here. I had between five and six hundred thousand dollars in reserve with these two companies which has been completely ignored, and this represented money I have accumulated back there for me, and that item should off-set an awful lot of these things. We were working on it.

Q. Do you know that the so-called accumula-

(Testimony of Joseph P. Lotz.)

tion that you had with American Fidelity and Casualty Company, according to their books, ended up to be \$10,000, approximately?

A. I knew it was about \$85,000 at one time.

Q. Well, it probably went in losses paid the assureds, didn't it?

A. I had a 20 percent guarantee with American Plan and it was up to \$80,000. I got that regardless of losses.

Q. At any rate, the present balance, apparently, on the [563] books of American Fidelity is about \$10,000?

A. Yes.

Mr. Garrison: Cross-examine.

The Court: We will recess until two o'clock.

(Whereupon an adjournment was taken in the above-entitled cause until the hour of two o'clock p.m. this date, Monday, May 10th, 1954.)

Mr. Tiedeman: Your Honor please, at this time on behalf of Defendant Lotz, I would like to present an amended counterclaim for filing.

The Court: Have both sides been served?

Mr. Garrison: Yes, we have.

We are compelled to object to the filing of any amended counterclaim, Your Honor. Apparently Counsel is not aware that this matter came before Your Honor previously, and on December 10th, Your Honor made an order dismissing the amended first counterclaim without leave to amend.

This matter was thoroughly argued before Your

Honor on a number of previous occasions and the Defendant Lotz given a number of opportunities to amend this counterclaim and they were never successful, and Your Honor finally ruled finally, the matter was taken up to the Circuit Court and Your Honor was affirmed.

There is a counterclaim still in the pleadings which Your Honor permitted to remain there. But this one has been argued so many times that I hesitate to go into it again. We filed an extended memorandum of the law with Your Honor setting forth the several grounds upon which this counterclaim must fall, one of which, and I think the one Your Honor commented on in one of Your Honor's orders, was that the [565] counterclaim attempts to set up an agreement which wasn't to be performed within one year, but which admittedly was not reduced to writing. So that I hesitate to go into a long argument on that.

The point now is that, right here in the middle of the case, to come now to seek another amended counterclaim that Your Honor has ruled was dismissed without leave to amend, seems to me totally tardy, and I would submit our objection upon the memorandum previously filed, with which I am sure Your Honor is familiar.

The Court: Do you wish to submit it now?

Mr. Kakures: Your Honor, just a few words: It is correct the record for appeal from Your Honor's order was not dismissed by the Circuit Court

but that Court held the appeal was not in order until this matter was first heard.

As I understand the objection raised to Mr. Dusky's first counterclaim on behalf of the defendant Joe Lotz was the fact that Mr. Dusky had pleaded assignment and also alleged that the plaintiff made promises, whereas on the face of the assignment there were no promises on the part of the defendant.

So far as the Statute of Frauds is concerned, we are pleading a matter which is substantiated by a number of California cases, that the plaintiff is estopped from asserting the Statute of Frauds when there is no oral agreement [566] entered into between the parties, and where the plaintiff relies on that promise and changes his position, and because of the conduct of the plaintiff, or the party asserting the Statute of Frauds, that the Courts, in order to have Justice prevail and equity, will not allow the plaintiff to assert the Statute of Frauds.

It is on those cases we are submitting this matter to you.

The Court: Well, did Counsel make a correct statement, that I sustained the objection without leave to amend?

Mr. Kakures: Yes, he did.

The Court: In what particular is this amended complaint differentiated from the one I ruled on?

Mr. Kakures: That one, I believe, Your Honor—I am not too familiar with the first one, but as I

understand it I think Counsel raised two points. One was the Statute of Frauds and the other was that there were no promises on the part of the plaintiff.

The Court: Submit the matter?

Mr. Kakures: Yes, Your Honor.

The Court: The motion to amend will have to be denied. Proceed. [567]

JOSEPH L. LOTZ,

one of the defendants herein, recalled as a witness on behalf of the plaintiff as an adverse witness under Rule 43(b) of the Federal Rules of Civil Procedure, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as hereinafter indicated:

Cross Examination

Mr. McCallum: Q. Mr. Lotz, you remember going to the Central Bank around August 22nd, 1951, with Mr. Hart and Mr. Smead? A. Yes.

Q. And you remember that was the time when the agreement was signed that has been introduced here as Plaintiff's Exhibit 17? A. Yes.

Q. The agreement to appoint Mr. Smead to report to American Plan? A. Yes.

Q. Following this meeting at the Central Bank, did the Central Bank call upon you to obtain some written authority showing your authority to endorse checks——

(Testimony of Joseph P. Lotz.)

A. (Interposing) About the same time.

Q. Just about that same time you remember writing to Mr. Hatfield, don't you? [568]

A. Yes.

Q. I show you what has been marked Plaintiff's Exhibit 1, which bears date of August 27.

A. Yes.

Q. Didn't you write to Mr. Hatfield shortly after that meeting at the Central Bank at which Mr. Hart was present? A. Yes.

Q. Thank you. [568-A]

Mr. McCallum: After you wrote to Mr. Hatfield you went over to the Anglo Bank, didn't you, Mr. Lotz? A. Yes.

Q. Do you recall about when that was you went to the Anglo Bank?

A. About the end of August—30th or 31st.

Q. August, 1951? A. Yes.

Q. And you went there for the purpose of opening a trustee account, didn't you? A. Yes.

Q. And at that time you told the man you were speaking with that you were going to deposit checks made payable to Mid-States Insurance Company?

Mr. McKinnon: If the Court please, I would like to object to this line of questioning in the absence of any statement from Mr. McCallum as to its purpose.

At a previous phase of the trial we entered into a stipulation, and some testimony was introduced subject to motion to strike, the subject being this: that in the suit Mid-States against Anglo Bank, the

(Testimony of Joseph P. Lotz.)

Anglo Bank maintained by its answer that Mr. Lotz had authority of Mid-States to endorse its name on the checks. The case was tried before Judge Harris, submitted, and there are forms of stipulated judgment. Judgment by agreement between the parties was entered in favor [569] of Mid-States Insurance Company.

Now, I would like to inquire whether the purpose of these questions of Mr. McCallum is to prove a case against a bank, but which case he so stoutly resisted during the trial? If the Court please, I can see no point involved because we never meant to try a case against the bank as the matter stands.

The Court: Indicate for the purpose of the record the purpose of the offer.

Mr. McCallum: Yes. I am not trying to try the so-called Anglo case.

The purpose of this testimony is to establish before the Court that this gentleman made certain representations to the Anglo Bank which he knew to be false and untrue, and as a result of those he obtained possession of funds made payable to the Mid-States Insurance Company, all as part and parcel of a plan to obtain funds for the purpose of paying the indebtedness of Mr. Lotz to the American Plan Corporation.

It does not go to the question or issues as to whether or not he had implied authority, or authority by estoppel or authority by negligence to endorse checks, but goes to the principle of the direct representations the man made, and a third person was

(Testimony of Joseph L. Lotz.)

injured, by carrying out a plan to obtain funds belonging to the Mid-States Insurance Company for the purpose of paying the American Fidelity or American Plan Companies. [570]

Mr. McKinnon: Then, if the Court please, we object to the question and object to the entire line of questioning on the ground that it conflicts diametrically to the position taken by the bank in the trial of Mid-States versus the bank. The issue has not been adjudicated, and there has been a stipulation entered, and we submit the evidence is totally immaterial and irrelevant in this proceeding.

The Court: I will allow the testimony to go in subject to motion to strike and over your objection.

Mr. McKinnon: All right.

The Court: I will give counsel a record.

Mr. McKinnon: All right. Will you read the last question?

Mr. McCallum: It was that he went there for the purpose of opening a trustee account.

Q. And at the time you opened the account, Mr. Lotz, you told the bank you were going to deposit checks made payable to the Mid-States Insurance Company, didn't you?

A. And other companies.

Q. And other companies, yes. And did the man from the Anglo Bank ask you if you had authority to endorse checks made payable to Mid-States Insurance Company? A. Yes.

Q. And you told him you did, didn't you?

A. Yes.

(Testimony of Joseph L. Lotz.)

Q. And you subsequently received a letter from Mr. Hatfield, [571] which is marked Plaintiff's Exhibit No. 2, did you not?

Mr. Garrison: Isn't that Intervenor's No. 2?

Mr. McCallum: Yes.

Q. Did you receive it on or about the date it bears, namely, September 5th, 1951?

A. Yes.

Q. And did you receive a subsequent letter from Mr. Hatfield, which is marked Intervenor's Exhibit No. 3? A. Yes.

Q. Did you receive this on or about the date it bears, September 10, 1951? A. Yes.

Q. Did you advise anyone of the Anglo Bank, Mr. Lotz, that you had received those two letters?

A. No.

Q. Did you ever advise them you had not authority to endorse checks made payable to Mid-States?

A. No.

Q. After you received the two letters which I have just exhibited to you, you continued to endorse checks made payable to Mid-States and deposited in the Anglo Bank, didn't you? A. Yes.

Mr. McCallum: No further questions. [572]

Cross Examination

Mr. Bronson: Q. Mr. Lotz, it had come into evidence earlier in the case that your agency for Mid-States started in May, 1947? A. Yes.

Q. And who was the party that you made those

(Testimony of Joseph L. Lotz.)

arrangements with and entered into the contract of agency? A. Mr. Marvin Donnelly.

Q. And you knew him to be, I presume, what has been described as a vice-president of Mid-States.

A. He was state general agent.

Q. He was California or Pacific Coast representative? A. Yes.

Q. And did you know he had a title of vice-president of the company?

A. I don't remember that he was vice-president, but he was a high authority.

Q. All right.

Mr. Garrison: I move to strike that on the ground it is a conclusion of the witness.

The Court: "High authority" may go out.

Mr. Bronson: Q. Did you have any discussion with Mr. Donnelly on the subject of what capital or assets or finances you had or not in taking on this business?

Mr. Garrison: Pardon me one moment, Your Honor. If the [573] Court please, we object to the question on the ground that it is incompetent, irrelevant and immaterial; attempts to vary the terms of a written instrument.

The charge here is that these defendants in the year 1951 committed certain acts which created a loss in the plaintiff and they are responsible for that loss because of those acts.

At the time these acts were performed, these parties, Mr. Lotz and the plaintiff, were operating their business together under a contract that was

(Testimony of Joseph L. Lotz.)

negotiated by Mr. Lotz and Mr. Hatfield and Mr. Titus in August, 1951. That contract is in evidence. It is very complete and it is very explicit, and it was in effect at all times that this alleged conspiracy occurred.

What occurred in 1947 under some other contract, what occurred some time in 1948 or 1949 or 1950 respecting what Mr. Lotz' arrangements might have been at that time, I submit would be not only incompetent, irrelevant and immaterial as to the issues now pending before this court, but would also attempt to vary the terms of a written contract which was executed some four or five years subsequent thereto.

Mr. Bronson: Our position is very simple. To start in, a proposition with the authority and consent and knowledge of an officer of the company, that I referred to as "kiting", and they kept it up continuously during the several changes of the contract, and finally into and beyond the time of the [574] execution of this contract counsel is referring to.

I had the temerity here, Your Honor, to briefly go into the historical aspects of the thing as a predicate to show the same arrangement was continuing to and beyond the contract—to and beyond the time of the last contract. There wasn't any change in the contract.

The Court: Read the question, Mr. Reporter.

(Question read.)

(Testimony of Joseph L. Lotz.)

The Court: The objection will be overruled. He may answer.

The Witness: Do I answer?

The Court: Yes.

The Witness: A. Yes.

Mr. Garrison: May the evidence go in subject to the motion to strike?

The Court: Yes.

Mr. Garrison: And may my objection that I have made run to all questions dealing with acts, events and conversations occurring prior to August of 1951?

The Court: The record so shows.

Mr. Bronson: Prior to August, 1951?

Mr. Garrison: Yes.

Mr. Bronson: You stepped over that line a good many times yourself.

Mr. Bronson: Q. At any rate, what discussion did you have [575] with Mr. Donnelly, remembering you are not bound to give the exact words, but at the time that the contract was entered into in May, 1947, what discussion was there on the subject of your finances in the financing of an agency for Mid-States?

A. Both my son and I were interested in this. My son was with me when Mr. Donnelly made a trip from Los Angeles to see us. We were not very well acquainted with this type of operation, so we mentioned we had no capital, no money, so he told us about the float.

(Testimony of Joseph L. Lotz.)

He said, "You have got this length of time to pay your bills", and he says, "You are using the company's money. That is the way the deal is set up." And that is where we got our thought about this time that elapses between the time we made these applications and the bill from the company.

For instance, if we got some business in January we had the rest of that month and maybe 30 or 60 days of the succeeding months to pay, and that was a continuous program. We had that intervening time of accumulation to pay.

Secondly, we had this money that we sent back there to Chicago earning some money, so that every month, for instance, if our—. Take as an illustration, if the premium was \$100, 85 per cent of that money was ours in a reserve, and one half of that, approximately, was credited to us in January, February, March. So there was a continual buildup there and we had money earning there, and this time element, and that was the [576] factors that would enable us to continue.

Mr. Garrison: Pardon me, is this part of the conversation? If it isn't, I object to it and ask that it be stricken on the ground that it is a volunteer statement by the witness. I thought he was telling about a conversation with Mr. Donnelly in 1947. If he digressed from it, I will ask that it be stricken.

The Witness: A. That was the point Mr. Donnelly was trying to have us understand, that we were working on this time element, and to use an illus-

(Testimony of Joseph L. Lotz.)

tration I took January so that it would be simpler, and that period was called a float.

The Court: Do I understand that this was a conversation you had with Mr. Donnelly?

A. Yes, and my son.

Mr. Bronson: Q. As I understand you, that conversation or explanation from Mr. Donnelly came as a result of your protest that you didn't have money of your own to carry on delayed operations like that.

A. We were ready to throw it out because we had no money.

Q. All right. Now, Mr. Donnelly, did he visit your place of business thereafter from time to time?

A. Yes.

Q. How frequently, as you would average it out, would he come and visit you and talk about the state of the finances and the state of your business?

[577] A. Every two or three months.

Q. When you use the term "float" did Mr. Donnelly introduce you to that term the first time?

A. That is where we first heard about it.

Q. And made it plain to you you were floating on the funds that were due to the Mid-States and were held by you for a period of time in your own hands?

A. That is right.

Q. You had your own office expenses of operation, did you not?

A. At that time my son and his wife helped me for nothing. We tried to get this thing going.

(Testimony of Joseph L. Lotz.)

There were no expenses outside of one desk, about \$10 a month.

Q. Subsequently your office grew to about how many employees at the largest?

A. I think there was a time when we had approximately forty, possibly a few more, employed in my office.

Q. During the year 1951—just to go on ahead a little bit—during the year 1951 can you estimate for the Court what percentage of your gross premiums it cost you to run your office? I am specifically taking it down to the time when you were writing for both Mid-States and American Fidelity and Casualty.

A. Yes. It was a little bit high.

Q. What percentage of gross premiums?

A. I can't tell you that exactly, but I think it was around maybe 16, or 17, possibly 18 per cent. May I add just a little [578] bit more?

Q. If it is explanatory, you may.

A. We were at the time in the process of reducing commissions and cutting our overhead and making readjustments, very substantially. We were checking accounts that weren't showing any profit and had eliminated some, so due to the big volume we were doing we were going through that procedure.

Mr. Garrison: Can we have the time fixed when the last voluntary statement refers to?

Mr. Bronson: Q. He wants to know if you can fix the time when you were doing that? What year was it, or what part of the year?

(Testimony of Joseph L. Lotz.)

A. This was in 1951.

Q. You brought up about—at least there was brought up the question of agents' commissions. Referring to the same time, what agents' commission were you paying as an average matter on your business for these two companies?

A. I think our average commission was about 27 per cent.

Q. During this period of time—I am referring specifically to 1951—did you have occasion, Mr. Lotz, at some time, or from time to time, to check out funds from the trustee account into your operating account for the purpose of accomplishing this float? A. Yes.

Q. And then on some occasions when you were paid commissions, [579] money that was coming to you were collections that you put in your operating account, transferred back from your operating account into your trustee account? A. Yes.

Q. Isn't it a fact that at least during that year both of these companies were principals of yours, and during which your business had increased so seriously, and funds were going back and forth between your operating account and your trustee account from time to time? A. Yes.

Q. You maintained one trustee account, is that true? A. Yes.

Q. And the premiums from Mid-States and from American Fidelity and from West America and National Automobile, Traders and General, and the

(Testimony of Joseph L. Lotz.)

companies you have mentioned here were put in that trustee account? A. Yes.

Q. And they were not separately earmarked?

A. No.

Q. So that when you checked out money to build up your operating account, taking it from the trustee account for that purpose, you were simply using or withdrawing on those commingled funds there?

A. Yes.

Q. And when on other occasions when your operating account was [580] up and your trustee account down, and for some reason by necessity of your office you wanted to build up your trustee account, you took funds out of your operating account and you placed them over without any earmark into the trustee account, is that true? A. Yes.

Q. You started in with a 25-day settlement period under this first contract, do you recall that? In other words, you were supposed to make settlement with the company on premiums collected in 25 days from the end of the month in which the business was written? A. Yes.

Q. Do you recall that? A. Yes.

Q. And thereafter the Mid-States, during the course of your representing them, increased that settlement period to 60 and finally 75 days in the summer of 1951, is that true? A. That is right.

Q. And during the period—Mr. McKinnon reminds me what I should make plain, that at least on the first October contract the Mid-States Company reverted to a 60-day period in the contract

(Testimony of Joseph L. Lotz.)

dated September 1st, 1951. I will merely add that as a comment. Do you remember that to be a fact?

A. I don't remember the date, Mr. Bronson.

Q. Assuming that you settled for all the business written in [581] a different month at a certain number of days after the close of that month, and assuming that the business comes in more or less equally during the month, and assuming that Mid-States was owed the month for which the settlement is made—. Strike that.

In any event, an additional month or only one day?

A. That is right.

Q. It added to the period that the company cedes to you as a settlement period, is that correct?

A. Yes, that is correct.

Q. Did you ever have occasion during the months and years following the beginning of business with Mid-States, that is, May of 1947 and up until the first of 1951, to discuss from time to time with Mr. Donnelly or his successors the matter of this float?

A. I discussed it with Mr. Donnelly several times, and my son discussed it with him. I think I discussed it with Mr. Cass, too.

Q. And was that at intervals from time to time during that period I mentioned?

A. I think so, yes. Might I make an additional remark, Mr. Bronson?

Q. I beg your pardon?

A. I have one additional statement with reference to this. Mr. Cass told me over the phone that

(Testimony of Joseph L. Lotz.)

this money that represented [582] the money reserve in Chicago, or wherever it was, always was there to balance any shortage that might exist because I paid out advanced commissions, because this money back there, less 15 per cent, was really funds of my own, of which we were paying these contracts on a yearly basis, one half of it should be paid to us less cost of adjustments and the losses.

Q. You gave testimony on this subject in the proceeding before the insurance commissioner, did you not? A. Yes.

Q. Referring to the same period, or in the year 1947, didn't you testify before the insurance commissioner as follows:

"Question: And just what was the substance of the conversation relative to the money issue?"

The date mentioned on the same page, page 59, is September, 1947.

"Answer: Well, I told him I didn't understand how I could operate without capital."

This is the conversation with Mr. Donnelly.

"So he gave me the thought on retrospective, and he says, 'I will pay your old account with money from the new business coming up.'"

Sort of credit following the reserve which you had with the company.

"Question: Did he have a name for it?"

"Answer: He called it the float.

"Question: That is a revolving float? In [583] other words, Donnelly knew you didn't have any money or capital?"

(Testimony of Joseph L. Lotz.)

“Answer: Yes.

“Question: So he told you you could operate on the float or the credit, whichever it is?

“Answer: That is right.

“Question: Did he tell you about what the credit or so-called percentage would be insofar as paying the bills with Mid-States was concerned?

“Answer: The time element was, at that time was 60 days after the completion of the month in which the business was written.”

Mr. Garrison: If the Court please, I object to counsel reading testimony from some proceeding in the insurance commissioner's office which doesn't apparently impeach Mr. Lotz, is simply repetitious and apparently read for the purpose of emphasis. And I submit that unless he is going to impeach Mr. Lotz with contradictory statements, reading from a transcript in a proceeding where we were not represented or present is simply done for the purpose of assuming some emphasis of the evidence.

I think counsel ought to either impeach in the normal way or not read supplementary matters on the same subject.

Mr. Bronson: I don't know, he may be an adverse person as to us. He is not my client, in any event, and any statement [584] that may apply to the insurance commissioner's proceeding—. But it certainly come in connection with what I am about to offer now.

Do you want to make a motion to strike?

(Testimony of Joseph L. Lotz.)

Mr. Garrison: I did intend to make a motion to strike.

Mr. Bronson: Well, I will wait for it.

Mr. Garrison: And particularly to suggest that further reading from the transcript of the insurance commissioner's office on matters which do not contradict the present testimony shouldn't be indulged in.

Mr. Bronson: Well, I will take counsel's scolding. I suppose you want to make a motion to strike all the answer?

Mr. Garrison: No, it is all right.

Mr. Bronson: All right.

Q. Did you give this testimony at the trial of the so-called bank case in May of last year? You were being questioned by Mr. McCallum.

Mr. Garrison: What page are you reading from?

Mr. Bronson: My notes must be in error—or, rather, Mr. McKinnon's. Oh, I have the wrong book.

(Colloquy off the record.)

Mr. Bronson: Q. Here, Mr. Lotz: Referring to Mr. Donnelly, top of page 6 of the transcript:

"Mr. Garrison: And when did that take place?

"Answer: Well, that must have been some time [585] later.

"Question: Still in the year 1947?

"Answer: Yes."

This is Mr. McCallum's examination of Mr. Lotz:

"Question: And you say your son Jack and you were present?

(Testimony of Joseph L. Lotz.)

“Answer: Yes, I think he was in my office.

“Question: Anyone else present?

“Answer: I don’t think so.

“Question: What took place then? What did you say and what did he say?

“Answer: We told him we had no money and he said, ‘Well, you don’t need any money. You are operating on our money.’ And he says, ‘You have this float which gives you so much time to pay your bill. In the meantime you are getting commissions and other money in checks from the company every month. That is the way this thing works. It works on what we call a float.’”

You gave that testimony, Mr. Lotz?

A. Yes, sir.

Q. That is correct, isn’t it?

A. That’s right.

Q. Going to another subject, now. Well, before we leave that, referring to the year 1948, 1949 and 1950, did you continue to [586] operate on the float basis? A. Yes.

Q. Did you ever get any protest from the company? A. No.

Q. You were in court, were you not, when I read certain dunning letters that were written to you by different officers of the Mid-States during the years—especially the years 1950 and 1951?

A. Yes.

Q. And those were times when you were late in paying at the very end of the credit period which the company allowed you to float on? A. Yes.

(Testimony of Joseph L. Lotz.)

Q. And how far behind in the year 1950 or in the year 1951, behind the furthest extension of the full period did you get from time to time?

A. It is impossible for me to tell exactly, but we were late maybe sometimes a week or two, something like that.

Q. How long?

A. Sometimes a week or two.

Q. Did you get behind as long as 30 to 60 days, Mr. Lotz?

A. Not behind the real extension, no, I don't think so.

Q. In the year 1951, with increasing business, you went to Chicago, did you not, in May, and talked to the officers of Mid-States there about extending your float period? [587]

A. I didn't go to Chicago in May. That was in August.

Q. You went to Chicago in August? Were you back there in May? A. No.

Q. No? Had you ever talked to any officer of Mid-States in Oakland about extending the float period?

A. I thought that I mentioned that to Mr. Hatfield at one time.

Q. When you went back there in August 1951, when you had just been in New York the day before, did you discuss an extension of the float period then? A. Yes.

Q. And did they consent to that request?

A. Yes.

(Testimony of Joseph L. Lotz.)

Q. At the same time you talked to them about reducing the company's retention of a percentage of that premium, did you not? A. Yes.

Q. And did they make that concession to you?

A. Yes.

Q. Was that in August, also? A. Yes.

Q. Had that been discussed with any officer of Mid-States Insurance Company here or there prior to the time they made you the concession when you were there in August?

A. I don't think anything previous to that, or any definite [588] proposal was mentioned, although there may have been a casual remark; but the first real discussion we had, I think, was in Chicago.

Q. Yes. They notified you from month to month what your loss ratio was? You heard the testimony of Mr. Hatfield? He says they called you up about the 15th of each month covering the month preceding, with each agent they had, among them you. Did they ever tell you what your loss ratio was running, according to your recollection?

A. I think at times we got some information, but not consistently every month.

Q. But they did tell you when your loss ratio was getting high, didn't they? A. Yes.

Q. Let me get at this: Wasn't the agreement on their part to reduce their participation in the \$1 or gross premium from 15 cents down to 14 cents so that you could come out with more profit on the deal and offset your loss ratio?

A. I imagine it was, yes.

(Testimony of Joseph L. Lotz.)

Q. Wasn't that the reason you asked them to reduce the amount on down so that the amount they reduced it would help you in the deal? A. Yes.

Mr. Garrison: That is objected to on the ground the document is the best evidence and speaks for itself, and his [589] conclusion would be a conclusion.

The Court: So far as the record goes there is nothing in the testimony in relation to 14 cents or what not.

Mr. Bronson: This is the first time.

Mr. Garrison: It was Mr. Hatfield said in his testimony he insisted——

The Court: Proceed.

Mr. Garrison: I have no objection to him going into it, but not the conclusion. If he wants to test his testimony, I certainly would have no objection, but the document speaks for itself.

Mr. Bronson: We are not talking about the document. Mr. Hatfield gave his story. I want Mr. Lotz' story why they chiseled another one per cent, and he is entitled to give it.

The Court: Proceed.

Mr. Garrison: Who chiseled the one per cent? Mr. Lotz?

Mr. Bronson: Yes.

Mr. Garrison: He can give the conversation, but his conclusion is something Your Honor has to draw, it seems to me. I do have a motion to strike his answer pending based on that objection.

(Testimony of Joseph L. Lotz.)

The Court: I don't recall it. Please read the question and answer, Mr. Reporter.

(Question and answer read.)

The Court: Let the question and answer stand.

Mr. Bronson: Q. Do you recall a discussion with Mr. Hatfield some time early in 1951 when there was discussion of how much you were paying sub-agents as commission?

A. I think so, yes.

Q. Do you recall throwing some of your own funds into one or the other of your bank accounts maintained for the Lotz Agency in that year?

A. In 1951 or 1950?

Q. You tell me the year it was. Didn't you put some funds of your own in there?

A. I put every cent I could get at that time in those funds. At one time I borrowed on my insurance, in the early stages, and another time I had a small inheritance of about \$700, my stepfather died, and I put that into my trustee account.

Q. Did you tell Mr. Cass or Mr. Hatfield or any other officer of the company about those invasions you made of funds into your agency accounts?

A. No.

Q. Coming down to the meeting you had with the Mid-States people in August—I am just referring to it for any refreshment of your memory it might be—Mr. Smead says that he phoned you in Chicago. He had flown out here directly to accompany you to Chicago on the August visit, 1951, and that he called you about the Public Service underwriting

(Testimony of Joseph L. Lotz.)

or rewriting, and asked you to mention it to the Chicago people. [591] Do you recall him telling you that? And he also added you responded in a telephone conversation and said you would do that?

A. This conversation with Mr. Smead was on the last evening before I left Chicago. We had finished with Mid-States, so I don't know of any occasion to go back because I was getting out of there that evening.

Q. Well, it is your testimony you made no reference to it? A. No.

Q. To those people?

A. I told them—do you want to know what I told them?

Q. Yes.

A. I told them I could write a large volume of business, and I told them it would be difficult for me to shoulder all of it, so they granted me that 15 per cent for a temporary measure until I got caught up.

Q. Mr. Lotz, referring to your business generally, there has been reference made here to some of these companies, to used car lot dealers and to new car dealers, these people being numbered among your sub-agents. A. Yes.

Q. Those sub-agents have their own licenses to sell insurance, issued by the insurance department of the State of California, is that right?

A. Yes. [592]

Q. Now, the insurance that is written by those

(Testimony of Joseph L. Lotz.)

particular types of installations is the so-called physical damage automobile insurance, is it not?

A. Yes.

Q. And referring to the year 1951, during the period you were representing both these companies, plaintiff and defendants here, what percentage of your gross premiums came from that kind of business?

A. Oh, the vast majority. It was practically——

Q. Practically all, wasn't it?

A. Yes, practically all of it.

Q. Now, when these officers from the company would come up from Los Angeles and to their local officers here and spend a day or two in your agency, wasn't there discussion where your business was coming from, where the source of it was from?

A. Yes.

Q. And then your dailies they went through, would they make any indication of the source of your business? They don't give the source of the business, do they? They only give the name of the assured, the address and occupation, and so on.

A. Also usually lists the agent on the bottom of the application, where it come from, yes.

Q. Is that shown on the daily? A. Yes.

Q. When these people came to your agency, Mr. Donnelly while he was there and Mr. Cass during the period he was there, and whoever followed him, would you make available to them anything they asked you to see—— A. Yes.

Q. ——of their records? A. Yes.

(Testimony of Joseph L. Lotz.)

Q. Would they question you about the source of your business and about how you were working, and all these various questions that the company you were representing would be interested in?

A. Mr. Cass came in, the first thing he would do, he would take off his coat and grab promiscuously at a certain number of dailies and check them to see if our underwriting procedure was in line with their ideas.

Q. There are certain types of business of that character that are less desirable than others, such as soldiers? A. Yes.

Q. Orientals? A. Yes.

Q. Negro people. And would your dailies make a showing of that particular thing?

A. Yes.

Q. And Mr. Cass would, when he had finished with his coat off going through things of that kind on his own, would he then discuss it with you?

A. Yes.

Q. Criticize it?

A. Yes. Recommendation.

Q. Or recommend, or what not? A. Yes.

Q. How long would his visits last ordinarily?

A. Oh, he would look at those dailies for a day or two.

Q. Mr. Hatfield said he came up on an average of once a month. Would your recollection be about the same as that?

A. Who came once a month?

Q. Cass. A. Oh.

(Testimony of Joseph L. Lotz.)

Q. Whoever came down, whether Oldberg, Cass, whoever it would be, would visit you about once a month?

A. Oh, that was in the later stages. Mr. Oldberg, he was working in Los Angeles. He came about once a month or so.

Q. When Mr. Oldberg came up there did he follow more or less the same technique that Mr. Cass did about going into your records without your help and did he, following that, discuss his findings with you?

A. Mr. Oldberg wasn't as well versed in underwriting as Mr. Cass and he was unable to recommend too much because I think he was in a different capacity. He was new out here and we helped him quite a bit.

Q. You helped him? [595]

A. We helped him get his bearings on this stuff.

Q. There has been some reference to substandard business, the company's attempt to offset substandard business such as certain classifications of assureds by rating structure to permit them to make more out of them, isn't that right? A. Yes.

Q. Did you have any business turned down by Mid-States that you produced from time to time?

A. I don't think so.

Q. And what was your rate scheme there by comparison with the manual rate on this business that wasn't standard?

A. Well, sometimes—for a time when I first started we had a rate two to two and one-half times

(Testimony of Joseph L. Lotz.)

higher than the manual. I think that general policy in the later time when we were operating, I think we had a formula of about seventy per cent manual, and that would also include some of the policies, what they call the "drive-your-own-car," and so forth, and the various things that might bring up the total amount.

Q. In other words, at the start if I got a certain coverage it would cost me \$50.00 in there, assuming I am a standard risk? A. Yes.

Q. Which I don't think you are justified necessarily in assuming. But these other things would go as high as two and a half times that? [596]

A. Yes.

Q. Or up to \$250.00 for that amount of coverage? A. Probably not quite that high.

Q. Later on it was reduced to something about seventy per cent above the manual rates?

A. I think that is about correct.

Q. Now, referring to the time when American Fidelity and Casualty Company came into this picture, did you hear from Mr. Hatfield on the subject of increasing your business with their company?

A. Yes, they wanted my business increased.

Q. Did you hear any protest from Mr. Hatfield or the field representative here about sharing the business with American Fidelity and Casualty.

A. Not directly. They were after more business, that is all.

Q. Coming down to the conversation in August when you were in Chicago, did Mr. Hatfield or Mr.

(Testimony of Joseph L. Lotz.)

Titus or anybody there encourage you to write more business with their company? A. Yes.

Q. Do you recall a conversation with Mr. Hatfield and Mr. Titus present while you were there and reference being made by either one or both of them to you as being in trouble? A. Yes.

Q. Well, state to the Court what you recall of that conversation. [597]

A. Mr. Titus said to me, he says, "Joe, you are in trouble." He says, "We will help you."

Q. Was there any conversation from Mr. Titus either before or after that to indicate what he meant by your being in trouble?

A. Well, previous to that we were discussing policy of the business and Mr. Hatfield was trying to be conservative, telling me he didn't think I should write over possibly forty or fifty thousand a month, but Mr. Titus says, "we will take all you can write," but he says, "we want you to write good business and grade it right", so that's it.

Q. Told you he would take all the business you could write? A. Oh, yes.

Q. Now, weren't you—were you having trouble—strike that. Were they pressing you for settlements at that time of your financial relations with them? A. No.

Q. Was there any comment about the way your loss ratios were running at that time by Mr. Titus or Mr. Hatfield? A. I don't think so.

Q. When he told you that you were in trouble and he would have to help you, was there any state-

(Testimony of Joseph L. Lotz.)

ment made of how or what they would do to help you?

A. No. They were after the contract, I think, and agreement had been completed, and that was just a remark supplementing it [598] later on. Mr. Titus said, "Joe, you're in trouble." He said, "we will help you".

Q. He supplemented the conversations that made up the new agreement by saying, "you are in trouble but we are going to help you out"?

A. Yes.

Q. And what he had written into that agreement by way of additional concessions to you was a fixing of the extension—strike that. Fixing of reduction of the company's retention?

A. Yes.

Q. And also another concession—what was that? He made an agreement for the first time in the history to give you a prepaid commission, did they not? A. Yes.

Q. Was anything said by either of those gentlemen that they were doing it to meet competition?

A. I don't remember that. I don't think so.

Q. Coming down after that, you had a meeting that you have testified to rather fully when Mr. Hart and Mr. Feller were out here, did you not?

A. Yes.

Q. And that was a few days later, around the 20th or 22nd of August, was it not?

A. I think it was. [599]

Q. And counsel has identified a letter. It is

(Testimony of Joseph L. Lotz.)

signed by you and says that in view of the fact that their company will not give a prepaid commission arrangement to you, that the contract is terminated? You know the letter that was shown to you this morning? A. Yes.

Q. Yes. Now, had you in the meeting in New York before you went to Chicago, when you were talking with Mr. Mark Hart and Mr. Feller, had you informed them of any agreement that you had or had in the making whereby you could get a prepaid commission, and asked them to meet it? Do you remember that conversation?

A. When I was in New York? You mean when we discussed this prepaid commission in New York?

Q. Yes. Well, let me put a leading question to you: don't you recall that in that meeting you stated that you could get from the Mid-States an arrangement whereby they would greatly relieve your financial condition by giving you a prepaid commission arrangement of fifteen per cent; and that they told you in response that their contact with the company for which they acted as managers, referring to American Plan, acting as managers for American Fidelity under that contract they couldn't give you a prepaid commission?

A. I tried to get a prepaid commission from Mr. Hart, that's right. In New York, you mean? [600]

Q. Yes.

A. Yes. But he said he couldn't give it to me, that's right.

Mr. Bronson: If I had a few minutes to look at

(Testimony of Joseph L. Lotz.)

my notes I would probably go a little faster, Your Honor.

The Court: Take a recess.

(Short recess.)

Mr. Bronson: Q. Now, Mr. Lotz, on the subject of Mr. McCallum's examination of you, is it true that in the early part of 1951, along about February, Mr. Hatfield came to your office and you showed him a stamp that you used to endorse the premium checks with? A. Yes, I——

Mr. Bronson: I am going to interrupt my question and call his attention to some statement he made at the insurance commissioner's hearing. It is underscored on page 79 of that proceeding and goes over to the next five lines.

Mr. Bronson: Q. Will you read that, Mr. Lotz, and don't answer the question further? Does that serve to restore your recollection on that subject?

A. I think they knew that I was using a stamp.

Mr. Garrison: May I see it?

Mr. Bronson: (Handing document to Mr. Garrison).

Mr. Bronson: Q. And did you understand during all the conduct of this business during 1951 that you had authority from Mid-States to endorse the checks by the use of the rubber [601] stamp that you have mentioned?

Mr. Garrison: That is objected to on the ground that what he understood would be a conclusion of his, and I submit he would have to confine it to conversations with officials of Mid-States.

(Testimony of Joseph L. Lotz.)

The Court: The objection will be sustained.

Mr. Bronson: Q. Did you in fact continue to use the stamp and endorse the premium checks that came in for these two companies in 1951?

A. Yes. [602]

Q. And were you using it at the times the various officials, Mr. Cass or Mr. Oldberg or others, came in there while your business was being conducted, and while they were going through your records in the manner you have described?

A. Yes.

Mr. Bronson: To supplement the statement made by Mr. McKinnon to Your Honor in the argument on the admissibility of certain evidence when Mr. McCallum was questioning the witness, I want to read from page 30 of the transcript of the trial of the bank case. It is the bottom of page 30.

"Mr. McCallum: Well, my view, Your Honor, is that there was no supervisory control maintained over this man at any time during the time he was representing the company. They weren't concerned what this man was doing with the money he handled as long as he got the monthly statements paid. How he operated it they weren't concerned with. That will be the position we are endeavoring to maintain."

And I comment he was representing the same defendant he is now.

Mr. McCallum: I make a motion to strike this. This is not testimony. It is an argument I made

(Testimony of Joseph L. Lotz.)

before the court, before another court, and my remarks are not testimony.

Mr. Bronson: It wasn't offered for that. Incidentally, [603] it is the same court in the same case.

Mr. McCallum: It isn't testimony.

Mr. Bronson: This is the Northern District, Southern Division, and it is the same court and same case.

The Court: Is this an opening statement?

Mr. McCallum: No, Your Honor, it is argument, apparently, that I made some time during the trial of the bank case.

The Court: Was that your position at that time?

Mr. McCallum: That is right, Your Honor.

The Court: Proceed.

Mr. Bronson: And I will add this from the top of the same page:

"Our position is that they permitted him to do that during the entire time he was their agent, which goes to the supervision and control of the agent."

Mr. McCallum: Pardon me. Does my motion to strike go also, if Your Honor please, to the second statement counsel made?

I find this very irregular for counsel, in the course of examination of a witness, to append something from another proceeding to an argument that was made about an hour ago at the time that I started to examine this witness.

The Court: We have a peculiar situation here confronting us. There was a phase of this case that has been tried by a different department here. [604]

(Testimony of Joseph L. Lotz.)

Mr. McCallum: That correct, Your Honor.

The Court: I am going to allow the testimony in subject to your motion to strike and over your objection. It may or may not become material. I am not prepared to say at this time. But your legal position is protected.

Mr. McCallum: Thank you. But may I just remind the Court that this is not testimony, it is argument that counsel is reading, Your Honor. It is argument.

Mr. Bronson: I offer it as a supplement to my associate's argument. It came a little late, but you can't always put your finger on these things, at the moment you are making the argument.

I put that in on account of the extraordinary change of position Mr. McCallum has gone through.

Mr. Bronson: Q. Now I will ask you, Mr. Lotz, if you testified—I am reading from page 31 of the transcript of the bank case—as follows:

“Question: (By Mr. McCallum): Mr. Lotz, whenever you wrote insurance, did you ever clear it with Mid-States Insurance Company before you wrote the insurance?

“Answer: Did I what?

“Question: Ever clear with them or get permission to write insurance before you wrote the policy?

“Answer: No. No, I operate almost as a company, with full authority. I had a right to reject or accept any applicant and I operated on that basis. I operated almost the same as a company with full power to do about anything we wished.

(Testimony of Joseph L. Lotz.)

“Question: Did you at any time during the entire period from 1947 to the end of 1951 ever get their advance approval before you wrote any insurance?

“Answer: No.”

You made that?

A. That's right.

Q. And that is true, isn't it?

A. That is right.

Q. Now referring — there's a little jumping around here for which I apologize, but I am referring back to the trip you made to Chicago following your visit to New York, both being in the middle of August, 1951:

When you got to Chicago isn't it true that you told both Mr. Hatfield and Mr. Titus you had been to New York and had seen Mark Hart and that you tried to get a better deal in New York and that you had failed? A. Yes. [606]

Q. And isn't it true that when they discussed with you then and there the additional concessions that they were making you, that these others were also added: that they increased your territory to the whole of California, is that right?

A. I think so.

Q. And that they for the first time permitted you to appoint your own agents?

A. I had that privilege previous.

Q. But you had to get an approval previously.

A. Well, I had it before that.

Q. That wasn't a change, then?

(Testimony of Joseph L. Lotz.)

A. No, that wasn't a change.

Q. That was not an additional concession?

A. No.

Q. Regarding the examination that was conducted this morning by Mr. Garrison, I noted that a number of his questions you answered, "That is probably right."

The Court may be interested here, Mr. Lotz, in the difference between your saying, "I remember that happened", and merely for courtesy or whatnot saying, "Such probably happened."

Now, what can you tell the Court in this connection when you say, "That probably happened"? I can't give you all the times you said it here, but were you giving him an actual memory you had or otherwise?

A. I am indicating that to the best of my ability I think [607] those things are correct. But at that time I wasn't myself. I had two big worries: this thing, getting this money in, getting it paid; and, second, physically I was ready for an operation at any time and my nerves were pretty bad, and my wife was also on the verge of a breakdown, so I wasn't exactly on an even keel as far as my mental poise was concerned, so I am unable sometimes to be specific and certain.

Q. Now, are you able with the additional examination as it goes on here to tell us whether or not you had discussed all these concessions that you got by the agreement of September 1st, 1951, that you hadn't already either been accorded them or prom-

(Testimony of Joseph L. Lotz.)

ised them or told that you would get them, before you ever went back and saw the people in Chicago?

I am referring to the 15 per cent prepaid commission, and to the reduction of the company's retention by one per cent.

A. I think that I mentioned that to Mr. Hatfield at some time previous to this, but——

Q. You mean you can't fix the time?

A. I think it was in my office, but it didn't seem to materialize at that time, so then when I was in New York I thought I could make another approach on that.

Q. Yes. But you told Mr. Hart in New York that you had a proposition with Mid-States for a prepaid commission? In other words, a portion of your commission, you would take it out just when you got the money, the 15 per cent. And you [608] mentioned that, you told me just before the recess, and Mr. Hart told you, "Well, we can't do that."

A. Mr. Hart—I asked Mr. Hart for a retention. I mean——

Q. Prepaid?

A. A prepaid, but he would not do it.

Q. Hadn't you already been told you could have that before you saw Mr. Hart?

A. Had I what?

Q. Hadn't you already been told by Mid-States you could get a prepaid arrangement before you saw Mr. Hart?

A. No, not definitely.

Q. Now, referring to this situation that developed out here at the end of November, 1951, when

(Testimony of Joseph L. Lotz.)

Mr. Hatfield was here, I want to ask you if you recall a telephone call——. I am going to change my question.

I am referring to the time immediately before this December 6th statement, the 10-page statement of Mr. Smead's. Do you recall Mr. Mead, your attorney, calling you up and saying that Mr. Hatfield had asked him for an appointment, for you to be there with Mr. Hatfield and get a statement of the facts? A. For the next morning?

Q. Yes. A. Yes.

Q. You didn't go to Mr. Mead's office the next morning, but rather there was a statement that was taken the night before? [609]

A. That is right.

Q. And the next morning you got a call from Mr. Mead, didn't you, some time around eleven o'clock, saying, "I thought you had an appointment", or something like that? A. Yes.

Q. And you informed him that a statement had already been taken? A. Yes.

Q. Referring to the assignments that you executed on the 27th of November—this goes back a few days earlier than the incident I just mentioned—do you recall this: That you had a conference with Mr. Hatfield in Mr. Mead's office, with Mr. Mead present, about the assignments and about the statement that was given that starts in "Of my own free will and accord", and so on? A. Yes.

Q. And Mr. Mead stating to Mr. Hatfield that there wouldn't be any assignments, or there wouldn't be any statement made unless Mr. Hatfield was will-

(Testimony of Joseph L. Lotz.)

ing to assure you and Mr. Mead that there wouldn't be any suits filed? A. Yes.

Q. Do you recall that you were asked by Mr. Mead to step out of the office, and after fifteen or twenty minutes you were called back in and they said, "All right, there will be no suits", in effect, and you thereupon went ahead and executed [610] the assignment that in effect transferred all your business and all your records into the hands of Mr. Hatfield's company? A. Yes.

Mr. Bronson: That is all.

Redirect Examination

Mr. Garrison: Q. Mr. Lotz, as I understand it now, in 1947 you were operating with your son and your wife?

The Court: I think possibly at this time I am prepared to rule on the motion to strike.

Mr. McCallum: Mine?

The Court: Statements of counsel are arguments of counsel and not evidence. Therefore, it will go out. Motion is granted.

Mr. McCallum: Thank you, Your Honor.

Mr. Garrison: Q. In 1947, you say you were operating without any particular overhead, just your son and his wife? A. Yes.

Q. And you had one desk, you say, in an office some place? A. Yes.

Q. And you paid a small amount of money per month for the use of the desk? A. Yes.

Q. I think you said \$10 a month?

(Testimony of Joseph L. Lotz.)

A. Ten or twelve, something like that. [611]

Q. Then as you went on in 1948 and 1949, I assume your business increased? A. Yes.

Q. And as a matter of fact, in 1948 you did a pretty good business, didn't you?

A. It was getting better, yes.

Q. And Mid-States Insurance Company paid you \$24,117 earned commissions in 1948 in cash, didn't they?

A. I think that is about it.

Q. And then in 1949 your business prospered further? A. Yes.

Q. And in that year they paid you \$48,862.78 in cash, earned commissions? You have to answer because the reporter can't see you nod your head.

A. Yes.

Q. And in 1950 you hit your maximum success in business, did you not? A. Yes.

Q. And they paid you that year \$70,685.02 in earned commissions? A. Yes.

Q. In cash? A. Yes.

Q. And in all those years you met your accounts with Mid-States Insurance Company, didn't you?

A. Yes. [612]

Q. You were sometimes late, you say, a week or so? A. Yes.

Q. And they wrote you follow-up letters when you were late? A. Yes.

Q. And that is the letters Mr. Bronson seems to

(Testimony of Joseph L. Lotz.)

delight in referring to as the "dunning letters", is that correct? A. Yes.

Q. And in no instance were you ever late more than a week or two or three?

A. I think that is correct.

Q. In all those years. Now, during that period of time you had a 25-day credit period before you had to pay the statement of the insurance company?

A. I think we had more in 1949 and 1950, it seems. Seems we were longer than that.

Q. Wasn't your contract amended in May of 1950 to give you 75 days?

A. No, in 1950 I think it was stretched to 60. Sixty. Then in 1951 I think it was increased to 75.

Q. 1951?

A. I think that is what it was.

Q. Yes. 25 days up to 1951, May, and then increased to 75, isn't that correct?

A. I can't remember that they had us 25 days at the start.

Q. As a matter of fact, it's common practice in every [613] insurance agency and general insurance agency relationship to have a credit period before the general agent has to meet his payment to the company, isn't it? A. Yes.

Q. That is true whether it be retrospective or in San Francisco, Los Angeles, New York, or elsewhere? A. Yes.

Q. And that is because of the explanation that has been given, that it takes time to collect those funds from sub-agencies, isn't that true?

(Testimony of Joseph L. Lotz.)

A. Yes.

Q. And all these years that you were receiving the substantial commissions you had a trustee account? A. Yes.

Q. Kept your funds separated in the trustee account? A. Yes.

Q. You are not telling this court that you didn't understand the laws controlling insurance agents respecting the maintenance of their principals' funds in a trustee account, are you?

A. No.

Q. You knew that? A. Yes.

Q. And whatever the conversation with Mr. Donnelly in 1947 was, that didn't affect your knowledge of your obligations under the laws of this state and your license as an insurance [614] agent, did it?

A. No.

Q. You receive bulletins two or three times a year from the insurance commissioner's office, do you not, in reference to trustee funds and the obligation of agents? A. Yes.

Q. You know what sections——

Mr. Bronson (Interposing): I doubt if that has any materiality here, Your Honor.

Mr. Garrison: It goes to his knowledge.

Mr. Bronson: It is what he did and what the company did that seals their relationship. Getting letters isn't part of it.

The Court: He gets two or three bulletins from the insurance commissioner?

Mr. Garrison: Every year he receives those dis-

(Testimony of Joseph L. Lotz.)

cussing the duties and obligations as an insurance agent.

Q. You know what 1730 of the Insurance Code is, don't you?

Mr. Bronson: Wait a minute. I had an objection here.

The Court: Let's ponder a moment. What is the purpose of this?

Mr. Garrison: It's just simply to show his knowledge of his obligations.

The Court: He says he knows.

Mr. Garrison: Very well. Maybe I am laboring the point, so I will withdraw the question. [615]

Q. And when you were approached by the American Fidelity and Casualty Company people in 1950, they offered you a better contract than you had with Mid-States Insurance Company, didn't they?

A. I think a longer time extension, I think.

Q. Yes. They were going to give you a credit period of 75 days, weren't they?

A. I think that is right.

Q. And did in fact give you such a credit period, isn't that so? A. Yes.

Q. And shortly thereafter they gave you a guaranteed commission, did they not? A. Yes.

Q. So that no matter what your losses were, they assured you that you were going to at least get 20 per cent commission, didn't they? A. Yes.

Q. And that was the reason that you switched your affections from Mid-States to American Fidel-

(Testimony of Joseph L. Lotz.)

ity and gave them your business commencing in January, 1951, because it was more advantageous for you, did you not? A. Yes.

Q. Now, when you were in New York Mr. Hart told you you were all through with them, didn't he, that you couldn't write any [616] more business in their company on any basis?

A. I think so.

Q. Yes. And it was because of the deplorable financial situation that you reported to them that he said that?

A. It was caused by that check, so far as I could say.

Q. At any rate, you were told in no uncertain terms that you were through with the American Fidelity and Casualty Company, weren't you, and the American Plan?

A. I don't know whether that was originally told to me in New York or whether I received that over the wire.

Q. Well, I will call your attention, Mr. Lotz, to Plaintiff's Exhibit 30, which is a document that you say you signed but which you do not recall having dictated. A. Oh, yes.

Q. And that says—well, read the first sentence, will you please?

A. This was in Oakland?

Q. Yes. But just read that first sentence, please.

A. This is after we were in New York?

Q. Oh, yes, this was after. This was in August—August 22nd. A. Yes.

(Testimony of Joseph L. Lotz.)

Q. It says, "Pursuant to my discussion with your Mr. Hart in New York on August 13th." And that discussion in New York of August 13th was the very cancellation of your contract with American Fidelity and Casualty Company, wasn't it? [617]

A. Let's see, I don't know whether that was definite in New York or not, but I guess it is definite right there.

Q. Yes, sir. And that refers to the New York meeting? A. It does.

Q. And that is the cancellation of your contract that we are talking about? Isn't that so?

Mr. Bronson: As I get the substance of all this long questioning, it is just what the document says. Is there any more than what it says on its face? Or do I mistake your purpose, counsel?

Mr. Garrison: Were you interrogating me?

Mr. Bronson: Yes. You have taken ten minutes now on it and all you have to do is read it again to the Judge. He has heard it three times.

The Court: The document speaks for itself. Let's proceed.

Mr. Garrison: Q. When you went to Chicago you didn't tell Mr. Hatfield you had had your contract cancelled by Mr. Hart, did you? A. No.

Mr. Garrison: Mr. Titus, I mean. I think that is all. Thank you.

Recross Examination

Mr. Bronson: Q. I have one more matter that I think comes [618] most rapidly by asking the witness about his testimony in the bank trial, so-called.

(Testimony of Joseph L. Lotz.)

Page 16. Question by Mr. McCallum:

"Were you present at a conversation at the Central Bank or at your office just immediately prior to the opening of your trustee account in the Central Bank at which Mr. Hatfield was present?"

"Answer: Yes.

"Question: Where did it take place?"

"Answer: On the main floor where Mr.—I think Akron or Crown or something like that has his office.

"Question: Is he an officer of the Central Bank?"

"Answer: Yes.

"Question: Who else was present at that time?"

"Answer: Oh, five or six men there. Smith, Johnson, Hatfield and I. I think Smead. No, I don't know that he was. Hard for me to remember. There were five or six of us there, five or six men. [619]

"Question: Do you remember what was said at that time by Mr. Smith and Mr. Hatfield?"

"Answer: Well, we discussed the general operations and someone asked if I had the power to sign checks, and Mr. Hatfield says, 'yes', and when they asked him if he could give them a statement, he said 'yes', but after that the meeting was over and nothing was done, just passed over."

Mr. Bronson: That's all.

Recross Examination

Mr. McCallum: Q. Mr. Lotz, the incident Mr. Bronson referred to, the matter that has just been read to you, took place prior to the time you opened the account in the Anglo Bank, didn't it? And it

(Testimony of Joseph L. Lotz.)

occurred prior to the time you got Mr. Hatfield's letter of September 5th, 1951, saying he couldn't give you authority to endorse checks?

A. That is right.

Q. And it occurred prior to the time you deposited the Public Service monies in the Anglo Bank account, too, didn't it? A. Yes.

Mr. McCallum: Thank you.

Mr. Bronson: And after that you followed Mr. Hatfield's instructions in the letter precisely and got the agents to make the checks payable to you—same funds, same type of income, [620] right?

A. Yes.

Mr. Bronson: That is all.

Mr. McCallum: You don't mean that you did that in every single case, do you, Mr. Lotz?

A. I was trying to. I was trying to get every agent to make these checks payable to me. That was the recommendation of Mr. Hatfield to overcome this situation.

Mr. McCallum: Well——

A. Let me add one more thing. And the other day, why, Mr. Titus showed a check there from a fellow by the name of Jackson from up in Chico someplace, and we tried to get him to make those checks to me personally, and sometimes he would get a bunch of policies in Traders and General and West American and there might not be a single policy in the Mid-States or in the—this other company, and he would make it all to one company instead of me. We couldn't get it.

(Testimony of Joseph L. Lotz.)

I had no time to run back and get those checks straightened out because the companies wanted money. So I put the stamp on them and deposited them, and I felt the general practice which I had been lead to believe—I was general agent, with all the authority I had, that he could put the stamp on there, because they wanted because they wanted my check.

That's what they wanted. So if I had had to get all them checks straightened out I would have been out of business much [621] sooner. Might have been happier.

Mr. McCallum: Q. Well, Mr. Lotz, do I understand that you took the three checks, the two of Jackson and one of George R. Fulmore, and tried to have them made payable to you?

A. I had men out on the road, yes. They were to see them. I had four men. That was their assignment, to try to get the checks always made payable to me.

Q. I am speaking now of these three particular checks. Did you try to have them made payable to you?

A. I am mentioning in particular this fellow, Jackson, yes.

Q. My question has to do with these three checks. Did you try to get these three checks made payable to you?

A. Oh, I don't recall about those particular ones.

Q. If you looked at them would you know?

(Testimony of Joseph L. Lotz.)

A. No. I never saw the checks. I was away and Mr. Smead and my bookkeeper handled that.

Q. You knew the Public Service checks were made payable to Mid-States, didn't you?

A. I didn't know that until this was completed. I was away. When I came back the whole transaction was completed in my office.

Q. Well, don't you recall, Mr. Lotz——

A. (Interposing): Oh, I signed—yes, pardon me. Yes, that's right, I signed half of them. I had my secretary on four out of the eight, whatever it was. [622]

Mr. Bronson: Do we understand those are checks out, not checks in? Checks from the trustee account over to your AFC account.

Mr. McCallum: I am not clear. I'm trying to get it straightened out.

Mr. McCallum: Q. The checks I am speaking of, Mr. Lotz, are the checks you received from the Public Service Company made payable to Mid-States, and my question is, you knew, didn't you, the Public Service checks were made payable to Mid-States Insurance Company?

A. I didn't know it at the time.

Q. I beg your pardon?

A. I didn't know it at the time.

Q. You did not know it?

A. No.

Q. Do you remember the big check of \$67,500 that came in, made payable to you, and you stopped payment on it and they issued a new one made pay-

(Testimony of Joseph L. Lotz.)

able to Mid-States? You knew about that, didn't you, Mr. Lotz?

A. Do you have that photostat of that check here?

Q. Yes, sir.

A. The endorsement, bears a stamp here. I don't think that I saw that check when it came in. But I probably would have stamped it, anyway. But I was not there when this came in. I don't think I was there. It doesn't show anything, only the [623] stamp of my bookkeeper.

Q. You turned right around, didn't you, and issued a check to American Fidelity and Casualty Company——

A. Yes.

Q. ——which has been marked Plaintiff's Exhibit 19 and bears your signature?

A. That is when I came back, yes.

Q. Did you try to get these checks made payable to you instead of Mid-States Insurance Company?

A. I think we did.

Q. Do you know that, Mr. Lotz, or are you guessing at that?

A. What's that?

Q. I say, do you know that to be a fact, or are you guessing?

A. I am pretty certain.

Q. Who went to Public Service and tried to have those checks made payable to your order?

A. Who?

Q. Yes. Did you understand my question?

A. Yes, yes, I understand the question.

Q. Now, I understood you to say that you

(Testimony of Joseph L. Lotz.)

thought you tried to have the Public Service check made payable to your order? A. Yes.

Q. And I ask you now, sir, who went to Public Service and tried to get the checks made payable to your order?

A. I don't know if anybody went over. I think those were my [624] instructions to Mr. Smead, and whether he went over there or not I don't recollect.

Q. You don't know of your own knowledge whether anyone tried to get these checks made payable to your order, do you?

A. Yes, I think I wanted them made payable to me.

Q. Well, do you know who went and spoke to them about it?

A. I told you I don't know whether anybody went over. I gave orders to Mr. Smead. Whether he went over or called them, or what happened—you don't have to go over to see people to get a check. You call them and they send it to you, don't they?

Q. Was there some reason why, then, you asked Mr. Smead to go to Public Service Company and try to have those checks made payable to you?

A. Because I had orders to have the checks made to me.

Q. Isn't it a fact that it was because they wouldn't take checks payable to you that you talked to them about it? A. I don't know that.

Mr. McCallum: Thank you.

The Court: Step down.

(Witness excused.)

Mr. Garrison: Call Mr. Titus. [625]

RAY E. TITUS

a witness called on behalf of the plaintiff, being sworn to tell the truth, the whole truth and nothing but the truth testified as follows:

The Clerk: State your name, your occupation and your address.

The Witness: Ray Edmund Titus. I am President of the Mid-States Insurance Company.

The Court: How long have you been so engaged?

The Witness: Since March, 1949.

The Court: Proceed.

Direct Examination

Mr. Garrison: Q. Mr. Titus, you knew you had an agent in Oakland, California, by the name of Joe Lotz in the year 1949 and later?

A. Yes, sir.

Q. And when did you first meet Mr. Lotz?

A. August 15, 1951.

Q. In your office in Chicago?

A. I met him first in Mr. Hatfield's office.

Q. And that was at the August meeting that we have been referring to in this trial?

A. Yes, sir.

Q. And did you have a conversation with him there?

A. We had a short conversation there. [626]

(Testimony of Ray E. Titus.)

Q. And then subsequently did you see him again?

A. See, I was having lunch with—a previous engagement that I had with Mr. Kuhn, in his office, and both Mr. Lotz and Mr. Hatfield and myself had lunch with Mr. Kuhn in his office.

Q. Did you then discuss with Mr. Lotz his business prospects?

A. Most of our discussion had to do with his previous experience and his baseball experience and so forth.

Q. But subsequent to that you did get into a discussion of the business organization?

A. Yes.

Q. That was in your office?

A. In Mr. Hatfield's office.

Q. The same day? A. Yes.

Q. Just the three of you present?

A. Yes.

Q. Will you tell us what that conversation was in substance?

A. Mr. Hatfield told me what he was discussing with Mr. Lotz, and I told Mr. Lotz that whatever arrangements he made with Mr. Hatfield were satisfactory to me.

Q. And Mr. Hatfield did review with you the subject of their discussion? A. Yes, sir.

Q. And what did he say those had been?

A. Mostly about the extension of time in his pay period, and [627] that he wanted to drop the retention from fifteen per cent to fourteen per cent.

(Testimony of Ray E. Titus.)

Q. Generally, the same subject that Mr. Lotz just described here? A. Yes, sir.

Q. Was there any conversation involving American Fidelity and Casualty Company?

A. No, sir.

Q. And did you make a statement to him, in substance, that he was in trouble and you were going to help him? A. No, sir.

Q. Did you make any statement in which the word "trouble" was used? A. No, sir.

Q. How long were you with Mr. Lotz and Mr. Hatfield?

A. Altogether it couldn't have been over an hour.

Q. And were there any statements made to Mr. Lotz at that time as to what kind of business that he was expected to produce under your new arrangement? A. No, sir, not by me.

Q. Was there any by Mr. Hatfield?

A. Not to my knowledge, one way or the other, when I was there.

Q. I beg your pardon.

A. Not to my knowledge when I was with Mr. Hatfield.

Q. And did you thereafter have a telephone conversation with [628] Mr. Hatfield while he was in Oakland, some time later—in fact, in November?

A. I had several conversations with Mr. Hatfield while he was in Oakland.

Q. And as a result, subsequent to one of those conversations, did you yourself come to Oakland?

(Testimony of Ray E. Titus.)

A. The first time I came to Oakland I did not talk with Mr. Hatfield directly. I talked with Mr. Czar who had talked to Mr. Hatfield.

Q. I see. You had talked to Mr. Czar, who had come out with Mr. Hatfield? A. Yes.

Q. And you then came to Oakland?

A. Yes.

Q. Did you meet Mr. Lotz and Mr. Smead in Oakland? A. Yes.

Q. Did you have meetings with them?

A. Yes.

Q. What date was it you arrived in Oakland?

A. December 5th.

Q. And where did you first see those two gentlemen?

A. I saw them on December 6th, at their office, in the morning.

Q. And at that time did you have a conversation?

A. Yes. We discussed the condition of the agency. [629]

Q. And did you talk with both of them together?

A. Yes, sir.

Q. And did they review with you the events of the preceding two or three months?

A. Yes, sir.

Q. And in the same way that Mr. Lotz and Mr. Smead have given their testimony to the Court?

A. That is correct.

Q. Did you then say anything about a statement from either of them? A. I did.

(Testimony of Ray E. Titus.)

Q. What did you say?

A. I asked them for a statement, if they would give me a statement of the facts, and I had already had a statement which had been given Mr. Hatfield by Mr. Smead, but it was unsigned.

Q. This was this ten-page, handwritten document we have referred to that is in evidence here?

A. Yes. And we had an appointment with Mr. Smead and Mr. Lotz and Mr. Mead to look at it in Mr. Mead's office that evening and go over the whole matter.

Q. Did you keep that appointment?

A. Yes, sir. Mr. Mead met us, the gentleman already mentioned as being there and Mr. Mead read the statement that had already been prepared, and they made a few changes in it and they both signed it. Mr. Mead notarized it. [630]

Q. Did Mr. Mead read the statement? You will have to answer out loud. A. He did.

Q. Was there discussion about it?

A. There was.

Q. And they both signed it at that same time?

A. Yes, sir.

Q. And the meeting then adjourned?

A. Yes, sir.

Q. Thereafter, did you see them again?

A. I saw Mr. Mead in Mr. Lotz' office.

Q. You mean Mr. Smead?

A. Yes, and Mr. Lotz. I saw Mr. Smead and Mr. Lotz in their offices the following morning, and Mr. Mead came in about eleven o'clock and talked

(Testimony of Ray E. Titus.)

with Mr. Lotz, and we discussed the condition of the agency generally, and Mr. Lotz was preparing me another additional statement which was submitted.

Q. He did not write one out at the same time Ralph wrote his? A. No, sir.

Q. And promised to supplement it later on, did he? A. That is correct.

Q. Then did he so prepare a supplement?

A. Yes, sir.

Q. Where were you when you received it from him?

A. He delivered that to me in Santa Monica Sunday afternoon [631] in Carl Oldberg's home—December 7th.

Q. You weren't present when he brought it down? A. No, sir.

Q. How long did you remain in Oakland?

A. I returned to Chicago December 9th from Santa Monica.

Q. And did you come back to Oakland after that?

A. I came back to Oakland on December 13.

Q. And is that the time when you had the meeting in my office that we have referred to?

A. After December 13th, that is right.

Q. Do you recall the date?

A. I think it was December 13th or 14th.

Q. And you heard Mr. Lotz refer to the matter and the others. Does that substantially confirm your recollection of the events? A. Yes.

(Testimony of Ray E. Titus.)

Q. Now, when you returned to Chicago did you get in touch with Mr. Hart about this situation?

A. Yes, I called Mr. Hart on December 10th in New York and we had a discussion.

Q. Did you make any notes of that telephone conversation before you had it?

A. Yes, sir, I did.

Q. Did you make any notes after your conference with Mr. Schimberg, your counsel?

A. I did. [632]

Q. Did you read the notes over the phone to Mr. Hart? A. I did.

Q. Do you have those notes? A. Yes.

Q. I wonder if you would just give us the conversation or your statement as you gave it to Mr. Hart on the telephone.

Mr. Bronson: Before he uses them, I would like to see them before they are read.

Mr. Garrison: Surely. This might be a good time to break, Your Honor.

The Court: Let me inquire, did you indicate to the Master Calendar Clerk or anyone how long a time you wished to proceed?

Mr. Bronson: I don't recall being asked, myself.

Mr. Garrison: We started this case with a jury and said it would take thirty days, but we have cut it down to two weeks.

The Court: That is sufficient for all purposes.

(Whereupon an adjournment was taken until

10:00 o'clock a.m., Tuesday, May 11, 1954.)

The Clerk: Mid-States Insurance Company and

Anglo California National Bank versus American Fidelity and Casualty Company, further trial.

RAY E. TITUS

a witness for the plaintiff herein, having been previously duly sworn to tell the truth, the whole truth and nothing but the truth, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Mr. Garrison: Q. Mr. Titus, last evening I asked you about the conversation you had with Mr. Hart when you called him from Chicago in his office in New York. You said you did have such a conversation, and that before you made the call you wrote out the things you intended to say to him? A. That is correct.

Q. Will you read to His Honor the things you said to him in that telephone conversation?

Before you answer that, this is December 12th, after you had been out to California.

A. The telephone conversation I had with Mr. Hart was on December 10th.

Q. December 10th? And you had been in California previous to that? [635]

A. That is right.

Q. And the statements Mr. Smead wrote, that had been completed and you had seen them and had talked to Mr. Smead and Mr. Lotz.

A. "I have just returned from Oakland and have gone into all the facts in connection with the deal with Lotz. At this point I am calling with re-

(Testimony of Ray E. Titus.)

spect to American Fidelity policies allegedly cancelled in November and the risks attempted to be replaced in Mid-States.

“While I was there I investigated the whole series of transactions between American Fidelity, American Plan and Lotz and what occurred with respect to Mid-States during that period.

“I have statements from Smead, Lotz, copies of agreements of October the 20th, 1951, letter to Smead, complete file of incoming and outgoing teletype messages, and notice of termination of Lotz’ agency appointment, which is prior to the cancellation notice sent out by Lotz.

“I have brought all this information back, and have spent the entire day with my lawyers, and they tell me the facts constitute fraud on Mid-States, and that American Fidelity and American Plan are liable to Mid-States, and they have also told me that American Fidelity is guilty of serious violation [636] of California insurance laws.

“I feel that before I tell my lawyers to bring all this out in the open I should give you a chance to straighten out this cancellation deal now, as it requires immediate action, as Lotz has not sent out Mid-States policies, and I am not going to let them go out without submitting the whole deal to the insurance department.”

After that portion of the message was given to him we had some miscellaneous discussions, which ended by him saying he would meet in my office on

(Testimony of Ray E. Titus.)

December 12th at 11 o'clock, and with that the conversation ended.

Q. And did you meet him on December 12th in your office?

A. Yes, sir, he came there with Mr. Feller. They came in about 3 o'clock because their plane had been delayed.

Q. Did you have further conversation at that time?

A. We discussed the entire matter. I told him about the things I had, although I did not show them to him. He did tell me that he had knowledge that I had this letter from Smead and his contract because he had talked with Mr. Smead in Oakland, and the meeting broke up about 5:15.

Q. Did you show him at that time any audit figures that you had made?

A. The audit figures I did not have at that time. We discussed the fact that I was having figures made up by Lester, [637] Herrick and Herrick. However, they had not come in.

After he left the office, they came in shortly after that; and he called me at home that night and we had further discussion, and I told him I had received the figures and made an appointment with him to meet me in the office next morning.

When he came in the next morning we had the figures there, I gave him a copy of them, and we discussed them in quite some detail. And he left the office with the statement that the American Fidelity directors were going to meet—I believe

(Testimony of Ray E. Titus.)

the date was December 14th—and he would lay the matter before them and let me know what their decision was with respect to the rewrites.

Q. Had you previously employed Lester, Herrick and Herrick to make an audit of the Lotz books?

A. Yes, sir, I made arrangements with them before I came out here on December 4th.

Q. And that was the same firm that was represented by Mr. Horton, the witness who testified here? A. Yes.

Q. Was that the extent of that conversation you had with Mr. Hart at about that time?

A. That's correct.

Q. Did you return to Oakland after that meeting?

A. Yes, sir, I came out here next day.

Q. And had further conferences with Mr. Lotz and Mr. Smead? [638]

A. That is correct.

Q. I believe you testified it was on this later trip that they came into my office and the statement was prepared there. A. That is correct.

Q. Did you receive some documents from Mr. Lotz in connection with a proposal that he had prepared to continue his operation?

A. Yes, sir. You mean after I came back?

Q. Yes. A. Yes, sir.

Q. And that was never accepted by you, I believe? A. No, sir.

Q. Then after that did you make arrangements

(Testimony of Ray E. Titus.)

or have arrangements made to take over the space that had been—some of the space Mr. Lotz had previously occupied and to rent some of his equipment? A. Yes, sir.

Q. And that arrangement is contained in Plaintiff's Exhibit 14, being a letter dated December 14th—December 18th, I guess it is.

A. December 28.

Q. December 28th? A. Yes, sir.

Q. I notice that attached to this exhibit is an inventory of office equipment. Is that the office equipment that you rented from him? [639]

A. That is correct.

Q. How much rent did you pay for the use of the equipment?

A. We paid him \$1,200 for a year.

Q. And after you had no further use for the equipment, what was done with it then?

A. It was returned to—. We offered it to Mr. Dusky or to Mr. Lotz, and I believe later he had some agreement with Mr. Dusky, and we eventually turned it over to Mr. Dusky under Mr. Lotz' approval.

Q. Mr. Dusky then being Mr. Lotz' attorney?

A. That is correct.

Q. I will show you a letter dated December 12, 1952, addressed to Mr. Lotz by Mid-States Insurance Company, and ask you if that is the document that contains the arrangement for turning over this equipment to Mr. Dusky?

A. It is.

(Testimony of Ray E. Titus.)

Mr. Garrison: I will ask that that be received in evidence as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Whereupon Letter dated December 12, 1952 addressed to Mr. Lotz by Mid-States Insurance Company was admitted into Evidence and marked Plaintiff's Exhibit No. 32.)

Mr. Garrison: If I may read this to Your Honor, it is [640] dated December 12, 1952:

"Mr. Joe Lotz, 5272 Lawton Avenue, Oakland, California.

"Dear Mr. Lotz:

"Attached hereto is a list of the furniture and chattels which were surrendered to Mr. Byron Dusky as your assignee. Would you please sign at the bottom indicating that your directions have been complied with and that said property was properly delivered."

It is signed by Mid-States Insurance Company, by Francis W. Keyes.

Then at the bottom it says:

"I hereby indicate my acceptance and approval releasing Mid-States Insurance Company from any liability in connection herewith", signed "Joseph P. Lotz"

Mr. Garrison: Q. At about the time you came back to Oakland after your meeting with Mr. Hart did you formally terminate Mr. Lotz' insurance agency with your company? A. Yes.

Q. I show you a letter dated December 18th——

Mr. Garrison: I think you have seen this?

(Testimony of Ray E. Titus.)

Mr. Bronson: I have seen it.

Mr. Garrison: Q. Addressed to Mr. Lotz by yourself, [641] registered mail, and ask you if that is the letter that was dispatched to him terminating his agency contract?

A. Yes, sir, that is a copy of it.

Q. Written by you? A. Yes, sir.

Mr. Garrison: I ask it be received in evidence as plaintiff's exhibit next in order.

The Court: It may be admitted and marked.

(Whereupon Letter dated December 18, 1952 addressed to Mr. Lotz from Mr. Titus was admitted into Evidence and marked Plaintiff's Exhibit No. 33.)

Mr. Garrison: I won't read it. It is just in the formal language.

Mr. Bronson: The effective date was what? January 21st, 1952, was it?

Mr. Garrison: January 21st, 1952.

Mr. Garrison: Q. What position did Mr. Donnelly have with your company?

A. He was an insurance adjuster and a field representative. He was terminated before I became president, but I am familiar with it.

Q. He left there in 1948?

A. The last of 1948 or early 1949.

Q. Was he ever an officer of the company? [642]

A. No, sir.

Q. How about Mr. Cass? How long since he has been employed by Mid-States?

A. He was—he left the company in October 1950.

(Testimony of Ray E. Titus.)

Q. Do you remember the extent of any writings in the Mid-States Insurance Company by Mr. Lotz in April and May of 1951?

A. His writings were almost non-existent. In fact, I believe in May we received minus writings because of cancellations.

Q. Cancelled out most of the business that he was writing? A. That is right.

Q. How about April?

A. April, there was very small writings. [643]

Q. And January? Let's see, in March, do you remember whether he had any?

A. They were very small writings that we had in the early part of 1951.

Q. Now, calling your attention to—well, first, was the account current with you at that time?

A. No, sir.

Q. Calling your attention to Defendant's Exhibit G, a letter from you to Mr. Hatfield dated June 6th, 1951—do you remember that letter?

A. Yes, sir.

Q. In that letter you say—

Mr. Bronson: May I see the letter, please?

Mr. Garrison: Sir?

Mr. Bronson: Are you going to refer to it?

Mr. Garrison: Yes.

Mr. Bronson: I would like to identify it, if I may. Thanks.

Mr. Garrison: Q. In this letter to Mr. Hatfield you say:

"I believe I already told you Kledzik should be

(Testimony of Ray E. Titus.)

responsible for lining up agents in the Los Angeles area, and I do not think you want to expand your activities with Joe Lotz.

“Again, I must say if we can’t get better representation in California than Joe Lotz, we will [644] never stay out of trouble.”

Would you tell the Court what the situation was you were talking about in that letter?

The Court: That was a June letter?

Mr. Garrison: Q. This is June of 1951?

A. Yes. That letter had to do with our appointments of representation in the Los Angeles area, and we already were represented there by a very high class agency and we had our own branch office there, and I did not feel that we should have any further representation there.

With respect to the reference to Mr. Lotz, we had had some trouble between the two agencies, Mr. Lotz giving certain agents a different deal than the other agency, and we were placed in the position of having two agents of the company giving different arrangements to their sub-agents. It was very embarrassing.

Q. In other words, it involved a problem in your agency plan? A. That is right.

Q. And at that time he hadn’t been writing any business, as you have just testified, and this letter had no reference to finances at all?

A. No, sir.

Q. I think yesterday, Mr. Titus, you made some

(Testimony of Ray E. Titus.)

reference to the amending of Mr. Lotz' contract in May. Do you remember your [645] testimony?

A. Yes, sir.

Q. What is the fact regarding the change that was made in Mr. Lotz' contract by your company in the month of May, 1951?

A. Mr. Lotz and Mr. Hatfield had had a conversation regarding reducing Mr. Lotz' retention in May, but that had never been formalized into a contract other than by letter, and it was later—it was done in September.

Q. It was accomplished later on?

A. Yes.

Q. I think you said in your testimony yesterday that it was accomplished in May. You are now correcting that, is that so?

A. That is correct.

Q. The change in the percentage in the retention, was that arrived at in May with Mr. Lotz?

A. Yes, sir, and formalized by a letter but not by contract, and it was in effect all that time.

Q. Yesterday I think your testimony was somewhat different with respect to the date of that change in retention.

A. No, it was in May.

Mr. Garrison: I see it was. That is all.

Cross Examination

Mr. Bronson: Q. You have given an explanation of the June 5th letter, 1951, where you said if you continued with [646] Joe you would always be

(Testimony of Ray E. Titus.)

in trouble—Joe Lotz, that is. I am showing you now a photostat of a letter, inter-company correspondence from Ray E. Titus to Dick Cass, and it is dated August 17, 1950.

Will you read that, and also read Mr. Cass' comment at the end.

A. "From what you tell me it seems to me Joe Lotz needs——"

Q. No, I just want you to identify it. Did you write that letter to Mr. Cass? A. Yes.

Q. Did Mr. Cass make the notation that appears in handwriting at the bottom? A. Yes, sir.

Q. And returned it to you?

A. Yes, sir.

Mr. Bronson: All right, that identifies it, I think. Would you mark that, please, prior to reading it?

(Whereupon letter dated 8/17/50, marked Defendant's Exhibit H for identification.)

Mr. Bronson: I will read this to Your Honor. It is dated August 17, 1950, from Ray E. Titus to Dick Cass. The typewritten part at the top is as follows:

"From what you tell me, it seems to me that Joe Lotz needs to be watched very carefully on a [647] day-to-day basis.

"Shouldn't you have a review made of his business coming in here by the Underwriting Department similar to what we made on Sandy Evans yes-

(Testimony of Ray E. Titus.)

terday to determine what day-by-day help he needs?"

Signed "Ray".

Mr. Bronson: Q. Apparently that refers to yourself? A. Yes, sir.

Mr. Bronson: Then under the signature "Dick" is the following handwritten portion at the bottom:

"Such is not the case. His loss ratio was excessive from his point of view—not ours. It was running about 55 per cent which did not leave him enough profit to expand the way I wanted him to. We are trying to get this ratio down ten or fifteen points so he will have more profit to reinvest in expansion so we make more money. Dick."

Q. Dick is the first name of Dick Cass, isn't it?

A. That is correct.

Q. And he was vice-president and field representative out here?

A. He was executive vice-president of the company at the time.

Q. Executive vice-president? Now, that was a year before this August meeting you had. [648]

A. That is correct.

Q. Did you set up a scheme with Mr. Cass to watch him day-by-day for that purpose?

A. What was mentioned in that memorandum was specifically mentioned—underwriting; and we did give him underwriting assistance, and it had to do with a previous memorandum which had been

(Testimony of Ray E. Titus.)

received from Mr. Lotz by us in which he raised a question about his loss ratio.

Q. Yes, but what I am getting at, we don't have it in the documents we asked you to produce, but it starts out and says, "From what you tell me." Now, there was some conversation between you and Mr. Cass, was there not?

A. That is correct.

Q. Which preceded that typewritten inter-office memorandum you sent him?

A. That is correct.

Q. And Mr. Cass presumably had that in mind when he put down his subscription at the end? That is, he had in mind the conversation that you had which you interpreted in your comments, true?

A. He had in mind the same thing I had in mind, which was the underwriting help which Mr. Lotz needed at the time so that he could write the proper kind of business to reduce his loss ratio——

Q. Yes, but—— [649]

A. ——which is all outlined in the letter.

Q. He indicates on here that his loss ratio was excessive from Lotz' point of view but not from the point of view of the company.

A. I think you will remember that the testimony in the file, or in the court, has mentioned that the loss ratio of the Lotz agency in 1950 was around 50 per cent, and naturally Mr. Lotz was interested in reducing that loss ratio so that he could make more money, and we were interested in that also.

Q. Yes, Well now, supposing in 1950 he was

(Testimony of Ray E. Titus.)

paying out 25 or 30 per cent to acquire business from sub-agents, was running a loss ratio of 55 per cent, and it cost him somewhere between 10 and 18 per cent to run his business, he was losing money the day Cass wrote this letter, wasn't he?

A. On your interpretation, but those were not the facts, sir, at that time.

Q. Well, you mean in respect to what he was paying to acquire the business?

A. No, with respect to how much money he was making as an agency.

Q. Well, he wasn't making out in Mid-States? He was losing money?

A. In 1950, sir, we paid him \$75,000 in commissions which he had made on business he wrote in Mid-States.

Q. Now, with reference to your statement about how much [650] business you were doing, that is, Mid-States was doing——

Mr. Bronson: If I may step up here, Your Honor, it will simplify it.

Q. I am referring to the Lester, Herrick and Herrick report. You have reviewed this page 13——

A. Yes.

Q. ——where it shows the business written month by month beginning in December, 1950, and going down to August? A. Yes.

Q. You are familiar with that?

A. Yes, sir.

Q. And you are familiar with the fact that he wrote in Mid-States sixteen thousand in January;

(Testimony of Ray E. Titus.)

thirteen, or practically fourteen thousand in February; and in March just a few dollars under sixteen thousand? A. Yes.

Q. Is that, in March, the business you say was practically nothing?

A. No. You will notice in December here he was writing \$33,000, and his account had been running twenty five or thirty thousand dollars a month in the writings that he had had prior to the time that he was contacted by American Fidelity, and then the writings dropped down to fifteen, thirteen, fourteen, and in the following month \$433, and the following month after that \$2,719. [651]

Q. Yes——

Mr. Bronson: Pardon me?

Mr. Garrison: He read \$2,719. That's a minus figure.

Mr. Bronson: That's a minus figure.

Q. In June he wrote \$32,000? A. Yes.

Q. A minus figure?

A. Sir, that was after the——

Q. The May meeting?

A. No, after the letter which I was talking about, which was on June 5th.

Q. Were you here in court—I may be misquoting Mr. Hatfield, but didn't he say the business for 1950 averaged around fourteen thousand a month?

A. It was my memory of the business that it was running around twenty to twenty five thousand dollars a month.

Q. There is no question about it, is there, Mr.

(Testimony of Ray E. Titus.)

Titus, that when you had your meeting in August 1951, you were very anxious to have Joe Lotz write a large volume of business for you?

A. Depending on what you mean by large. Why, twenty five——

Q. (Interposing) You wanted him to increase his business?

Mr. Garrison: Let him finish his answer.

Mr. Bronson: I beg your pardon.

A. I think we were anxious in having Mr. Lotz write us \$25,000 premium volume. [652]

Mr. Bronson: You indicated this morning in connection with some testimony you gave yesterday that the concession that was given Joe Lotz as to the company retention, reducing it from fifteen to fourteen per cent was made in May, 1951?

A. That is correct.

Q. Was that in a meeting with Mr. Lotz?

A. I was not present there.

Q. Where was it?

A. It must have been a conversation that Mr. Hatfield and Mr. Lotz had. There was no meeting at that time.

Q. You knew about it, did you not?

A. Yes, sir.

Q. Was the conversation between Mr. Hatfield and Mr. Lotz in Chicago or in Oakland?

A. Mr. Hatfield brought the matter to my attention.

Q. Well, where was the meeting that they had where they discussed it with Lotz?

(Testimony of Ray E. Titus.)

A. I imagine it was by phone.

Q. But you didn't formalize that until the agreement of September 1st?

A. That is correct.

Q. But the company started thereafter immediately in May, didn't it, to reduce its retention to fourteen per cent?

A. That is correct.

Q. Was that for the purpose of reducing the business that [653] Joe was writing for you?

A. No. We were anxious to get the business because it had been taken away from us by American Fidelity and we were anxious to get it back.

Q. It wasn't because Joe was running behind?

A. No, sir.

Q. It wasn't to meet competition?

A. I don't know of any other reason we would reduce a retention which we had maintained for pretty near three years.

Q. Did you ask for a statement from his books from Mr. Lotz at that time?

A. No, sir.

Q. Did you ever?

A. No, sir.

Q. During all the time that he was writing for Mid-States, going back to 1947, you never asked him for a statement?

A. No, sir.

Q. You didn't ask, for instance, for a statement—I mean by that a statement of his assets, liabilities and earnings?

A. That is what I assume you mean.

Q. Did not ask for one at or about the time you wrote this letter of August 17th, 1951?

A. No, sir. I was not concerned about his finan-

(Testimony of Ray E. Titus.)

cial ability at that time because he had been a good agent for us and was a good agent for us in 1950.

Q. You mean in the sense that he was getting business?

A. And making money for him and us both.

Q. And the way he kept his accounts?

A. Sir?

Q. In connection with the way he paid off.

A. Yes, sir.

Q. On his obligations? A. Yes, sir.

Q. Coming down to this trip you took out here in December of 1951, you say you got here, if my notes are correct, on December 5th but you didn't see Mr. Lotz until the next day?

A. That's correct.

Q. You saw Mr. Smead, did you?

A. Not that first day, no, sir.

Q. All right, you saw Mr. Lotz and talked about the agency. A. Not the first day.

Q. When did you talk about it?

A. The following day, December 6th.

Q. Did you see on December 6th a statement that Mr. Smead had written, the ten-page, handwritten statement? A. Yes, sir.

Q. And at the time you first saw it you noted Mr. Lotz hadn't signed it, did you not?

A. Yes, sir, and neither had Mr. Smead.

Q. Did you call up Mr. Lotz on the telephone either that day [655] or at or about that time and ask him, "Are you going to cooperate? Are you going to sign this statement?"

(Testimony of Ray E. Titus.)

A. I believe there was such a conversation. I don't remember whether it was on the phone.

Q. At the time he signed it, isn't it a fact that you told him if he would sign it you would keep him in business and not close the agency?

A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Q. Did you ever have a conversation of that kind in the presence of Mr. Smead?

A. No, sir.

Q. Are you sure of that? A. Yes, sir.

Q. Well, what is the situation then? That the agreement wasn't signed, you telephoned and asked, "Are you going to cooperate? Are you going to sign that?"

Didn't you do anything or say anything to grease the wheels, or make any promises in that connection?

A. No, sir. I was trying to find out what the facts were.

Q. I understand that. But he hadn't signed the statement that you wanted signed—wanted signed bad enough to phone him and ask him if he was going to cooperate with you. Apart from your interest in the facts, you wanted his signature on it, [656] didn't you?

A. I wanted to get the facts.

Q. Did you want his signature on that—oh, excuse me.

Mr. Garrison: Just give him a chance to answer.

(Testimony of Ray E. Titus.)

A. This gentleman owed us three hundred thousand—

Mr. Bronson: Once in a while your foot gets over the line without your intending it.

Mr. Bronson: Q. Go ahead and start the answer over again.

A. This gentleman owed us some \$450,000.00, and naturally we were both interested in trying to come to some understanding about what was going to be done about it.

Q. Both who? A. Mr. Lotz and myself.

Mr. Bronson: I will ask that what Mr. Lotz wanted go out as a conclusion of the witness, unless Mr. Lotz said something.

A. Will you restate your question?

Mr. Bronson: I am addressing an objection to the Court.

The Court: It may go out.

Mr. Bronson: Q. Go ahead.

A. We had, on the second occasion I was here, December 6th, we had many conversations about the condition of the agency, and Mr. Lotz called his attorney, Mr. Mead, and we agreed to meet in Mr. Mead's office that evening, which we did, and [657] Mr. Mead read this statement which had been prepared by Mr. Smead, and comments were made about it, changes were made in it, Mr. Mead notarized it. There was no pressure of any kind on my part to get anything else other than the facts into the statement.

Q. Specifically, and before you got the signature

(Testimony of Ray E. Titus.)

of Mr. Lotz on that agreement, and at or about the time that you were asking him was he going to co-operate, did you get any statement from him at all about what your plans were with regard to the further operation of the Lotz agency?

A. I had no plans about the agency.

Q. Did you make any statement to him on the subject? A. No, sir.

Mr. Bronson: That is all.

Cross Examination

Mr. Kakures: Q. Mr. Titus, do you remember the date of your arrival in Oakland in December?

A. Yes, sir.

Q. Approximately what date was that?

A. December 5.

Q. And did you upon arrival meet with Mr. Hatfield?

A. That's correct, at the Leamington Hotel.

Q. At that time what did Mr. Hatfield tell you?

A. He reviewed the account and what he had found out while he was out here, and told me of meetings he was having with—— [658]

Q. (Interposing) And your trip here, Mr. Titus, was in response to that telephone call you had from Mr. Hatfield?

A. He called, Mr. Hatfield called Mr. Czar and Mr. Czar called me.

Q. You didn't talk to Mr. Hatfield on the telephone? A. No, sir.

(Testimony of Ray E. Titus.)

Q. After your meeting there at the hotel, what happened after that? A. The first day?

Q. Yes, sir.

A. I had other business to do. I was trying to find a lawyer, and I made a phone call—Do you want to know everything I done that day?

Q. No, I just wanted to know what you did right after that in relation to the Lotz agency matter, such as contacting Joe Lotz or Mr. Smead or any of the personnel there.

A. I contacted neither Mr. Lotz or Mr. Smead that day.

Q. When did you first see Mr. Lotz or Mr. Smead?

A. The following day, in the morning, December 6th.

Q. And was that in their office? A. Yes.

Q. And what did you tell Mr. Lotz?

A. We discussed the condition that his agency was in. We discussed the fact that he had told Mr. Hatfield, and this plan that apparently had been conceived; and I wanted to get [659] the facts on it and, as I previously testified, we arranged a meeting in Mr. Mead's office.

Q. At that time did you tell Mr. Lotz that, words to this effect, Mr. Titus, that, "things look a little tough, Joe, but if you cooperate with us we will help you along?" so far as you recall, Mr. Titus?

A. I don't remember any statement with the word "cooperate" in it, although I attach no significance to it. I might have said it.

(Testimony of Ray E. Titus.)

Q. Did you add any words of encouragement, that you would see to it, that you would help Joe out of this so-called mess he was in?

A. Well, we were anxious to work a plan out. I am not familiar—I do not remember any specific comment in that respect.

Q. In other words, it was your interest, of course, as President of Mid-States, to first of all get this thing worked out and get it shipshape, is that correct?

A. That is correct.

Q. Then did you at that time ask Mr. Lotz or Mr. Smead for these statements, Mr. Titus?

A. Yes, sir.

Q. What was Mr. Lotz' response to that?

A. Mr. Lotz was, as he testified, very confused and he was—he said he would give us a statement, but he did not at that [660] time.

Q. Was Mr. Hatfield with you at that time?

A. Yes, sir.

Q. And then Mr. Smead, I presume under your testimony, and Mr. Hatfield started writing his statement, is that correct?

A. Mr. Smead had written his statement the night before.

Q. The night before? And then did you take a statement back from Mr. Smead?

A. No, Mr. Hatfield gave me the statement in the morning—the following morning.

Q. Then what did you do with that statement?

A. I left it at the safe at the Leamington Hotel.

Q. And that evening you took it up to Mr.

(Testimony of Ray E. Titus.)

Mead's office, is that correct? A. Yes, sir.

Q. And Mr. Mead, at that time, was he representing— A. Mr. Lotz.

Q. Mr. Lotz? And was Mr. Mead at all surprised about the fact that statements had already been given, Mr. Titus?

A. He didn't seem to be.

Q. Did he refuse to read the statements?

A. No, he read them.

Q. Did he read them out loud? A. Yes, sir.

Q. And you said he showed no—He didn't rebuke you or [661] Mr. Hatfield for having taken the statements outside of his presence?

A. No, sir.

Q. When was it that you and Mr. Hatfield and Mr. Smead, I believe, and Mr. Lotz went to Mr. Garrison's office?

A. That was after I returned out here after December 13th. I believe it was the 14th or 15th, somewhere in there.

Q. And at that time—Excuse me.

A. In any event, it was between December 13th and December 20th when I returned to Chicago.

Q. At that time did you see Mr. Lotz in Mr. Garrison's office? A. Yes.

Q. Did you talk to Mr. Lotz?

A. Yes, sir.

Q. What did you tell him at that time?

A. We just discussed the events that had happened.

Q. Did you tell him, "Joe, I will do everything

(Testimony of Ray E. Titus.)

I can for you under the circumstances if you will go along with us, I will help you out," words to that effect?

A. I don't remember any statement like that.

Q. Did you tell him you would keep him in business if you possibly could? A. No, sir.

Q. Did you tell him you wouldn't revoke the agency at that [662] time?

A. No, sir. It wasn't discussed.

Q. Coming back to the assignments, Mr. Titus, you were not here when the assignments were taken from Mr. Lotz, were you? A. No, sir.

Q. Who represented Mid-States in that?

A. Mr. Czar and Mr. Hatfield.

Q. And were those requested on your part?

A. No, sir.

Q. Who requested those assignments?

A. That was Mr. Hatfield and Mr. Czar.

Q. Following this meeting in Mr. Garrison's office, when was the arrangement introduced for the taking over of the Joe Lotz agency, that is, so far as the equipment and supplies, and so forth?

A. I believe that was December 28th. That was after I had returned to Chicago.

Q. In other words, after Mr. Garrison's office meeting there you left for Chicago, is that correct?

A. On December 20th.

Q. And who maintained the office here for Mid-States at that time?

A. Mr. Hatfield was here and Mr. Keyes.

Q. How long did that operation continue?

(Testimony of Ray E. Titus.)

A. Until 1952 when we turned back the furniture and [663] equipment, and so forth, to Mr. Dusky which I have just testified to.

Q. Now, when did the Mid-States Insurance Company enter the insurance business in California?

A. I believe it was in—I am not sure of the date.

Q. And you withdrew from the insurance picture in California shortly after you closed up the Lotz agency?

A. We stopped writing business in California. We are still qualified in California.

Q. But you are not writing any insurance business? A. That is correct.

Mr. Kakures: That is all.

Mr. Garrison: I have no further questions.

Mr. Bronson: Let me develop one thing.

Recross Examination

Mr. Bronson: Q. Did I understand that you were in Mr. Garrison's office on December 18th at the time that typewritten statement was taken?

A. Yes.

Q. And you terminated the agency five days later by a formal letter? That was the 23rd, was it?

A. I thought it was the 28th. It might have been the 23rd.

Q. Well, whenever it was, you knew when you sat there in Mr. Garrison's office you were going to terminate the agency? [664]

A. I did not, sir. The minute I made up my

(Testimony of Ray E. Titus.)

mind to terminate it, it was terminated, whatever the date is on the memorandum.

Q. Had you looked at the assignments, written assignments that were taken from Joe Lotz, dated around November 27th?

A. Did I look at them?

Q. Yes. A. Yes, sir.

Q. Well, they supply a provision there that the assignment can be terminated summarily without notice, do they not?

A. I am not—Are you talking about the——

Q. What is the agreement?

A. Talking about the statement Lotz made?

Q. What I am referring to was a letter. I can't readily find it here among this mass of exhibits, but it was dated that day, November 27th.

A. In which we gave him a 30-day cancellation notice?

Q. No, it is a letter written by Mr. Lotz, starts out, "Of my own free will and accord". Do you recall that letter? A. Yes.

Q. Do you recall, there is a provision in there where he accords you, or at least he accords whoever prepared the letter, a summary cancellation without notice?

Mr. Bronson: Have you the exhibit number of that, Mr. Garrison? [665]

Mr. Garrison: Yes.

The Witness: That is it you have your hand on.

Mr. Garrison: That is the letter that was prepared by Mr. Czar, the attorney out here from Chicago. It is one of these three (indicating).

(Testimony of Ray E. Titus.)

Mr. McKinnon: I think it is Plaintiff's Exhibit 6.

Mr. Bronson: Yes, that is it. I have it here.

Mr. Bronson: Q. Plaintiff's Exhibit 6, Mr. Titus, and on the second page, next to the last paragraph.

A. I remember the agreement, although we never accepted this agreement. That was the one that was——

Mr. Bronson: I will read a portion of it. It is the letter, if the Court please, signed by Joseph Peter Lotz and witnessed by Mr. Mead and Mr. Smead, dated November 27, 1951. The paragraph next but the last on the second page:

"I realize that I have violated my agency agreement with you, and agree that you are not waiving and have not waived any rights accruing to you from such violation, and I further agree that you have the right to cancel my agency agreement, dated September 1, 1951, at any time without notice and with or without cause, and I hereby hold you blameless and harmless for any loss that I might sustain due to such cancellation by you."

Mr. Bronson: Q. When you acted on November 28 to cancel [666] Joe Lotz' agreement, you made it effective as of January 21, 1952, am I correct in that? A. Yes, sir.

Q. But when you were over there in Mr. Garrison's office on the 18th of December, at the time the long, typewritten statement was taken, signed by both Lotz and Smead, you had already—Pardon me.

That followed the conversation on the telephone

(Testimony of Ray E. Titus.)

by some days with Mr. Hart that you mentioned?

A. That is correct.

Q. You had already made up your mind that there was a cancellation coming up as soon as you got around to writing it, hadn't you?

A. Are you telling me what I made up my mind to?

Q. I am asking you if that isn't true?

A. No, sir.

Q. You made it up, did you, the day you wrote the letter, December 28th?

A. That is correct. Do you wish me to explain why?

Q. No, I don't. If your counsel wants you to give any explanation, he will bring it out, I am sure.

A. I am sorry.

Mr. Bronson: That is all.

Mr. Garrison: Do you wish to make any comment regarding your answer, Mr. Titus? If you don't, it isn't necessary. [667] I have no further questions.

(Witness excused.)

Mr. Garrison: That is the Plaintiff's case, Your Honor.

Mr. Bronson: Now, has the Anglo Bank any case to put in?

Mr. McCallum: No further case.

Mr. Bronson: How about you (addressing Mr. Kakures)? Anything further?

(No audible response.)

Mr. Bronson: Very well. First, if the Court please, I would like to reserve at this time, to be

presented later, a motion to dismiss on the Plaintiff's evidence.

Our first testimony is the deposition of Richard M. Cass, taken on behalf of American Fidelity and Casualty Company and American Plan Corporation in Chicago, Illinois, on April 20, 1954. With the Court's permission and counsel's, I will read that.

The address at which it was taken is not important. That was present Mr. Lewis Schimberg, who is in Court, and Messrs—I believe you gentlemen weren't personally represented at the time?

Mr. Garrison: No.

Mr. Bronson: Mr. Max Weingarten of my office, who appeared for the two corporations. Certain stipulations were entered into which I shall not read, and the witness was sworn.

(Whereupon the deposition of Richard M.

Cass was read to the Court by Mr. Bronson.)

Mr. Bronson: That concludes the deposition. I will call Mr. Mark Hart, please.

MARK HART

a witness called on behalf of the defendant, being sworn to tell the truth, the whole truth and nothing but the truth testified as follows:

The Clerk: Q. State your full name and occupation to the Court.

A. Mark M. Hart. I am president of the American Plan Corporation.

Direct Examination

Mr. Bronson: Q. How long have you held that position, Mr. Hart? A. For seven years.

Q. For seven years? A. Yes, sir.

(Testimony of Mark Hart.)

Q. And how long have you been in the insurance business generally? A. For thirty years.

Q. Prior to your association with the present employer, the American Plan Corporation, what was your connection, briefly, with the insurance business from the beginning?

A. For the previous five and one-half years I was executive vice-president of the Resolute Insurance Company in Hartford, Connecticut. And for some eight years prior to [669] that I was agency acting supervisor of the Globe & Rutgers Fire Insurance Company. Prior to that I was assistant chief accountant of the Importers and Exporters Insurance Company.

Q. You assumed this position you presently hold about seven years ago, you say?

A. Yes.

Q. Would you briefly state—and I mean briefly—the relationship between the two defendants, American Plan Corporation and American Fidelity and Casualty Corporation?

A. The American Plan Corporation holds a management agreement with the American Fidelity and Casualty Company as one of its companies, the gist of which is that we are constituted as United States Automobile Physical Damage managers. We perform various work for that insurance company.

Q. Except to underwrite? I mean, they write the insurance and issue the policy, is that right?

A. Well, that is right, but an insurance company generally doesn't write the policies, either. We, that is to say, perform every function that would ordi-

(Testimony of Mark Hart.)

narily be accomplished by an insurance company, and we submit only monthly summary figures to our principal, the American Fidelity and Casualty Company.

Q. The fund, though, and the actual underwriter of the insured company, is American Fidelity and Casualty, is [670] that true? A. Yes, sir.

Q. Is that relationship unknown in the insurance business except in your case?

A. No, sir, it is common in the open marine field, and the inland marine field, or I should say in any specialized field of insurance.

Q. American Fidelity and Casualty does write other types of insurance besides automobile physical damage?

A. Yes. Primarily they are transportation specialists for public liability and property damage.

Q. Your first acquaintance with Joe Lotz—personally, I am speaking of now—was when?

A. In May, 1951.

Q. Is that the first time you ever met him personally? A. Yes, sir.

Q. Did you have knowledge of the account of Joe Lotz before that time? A. Yes.

Q. When you saw him in May, 1951, where was that? Here or elsewhere?

A. It was in San Francisco. He came across the Bay to meet me. I was here on other business.

Q. Did you have difficulty with him at that time about his job? [671] A. In general, yes.

Q. Did you know in general the length of time with which your company had had relations with

(Testimony of Mark Hart.)

him and the extent of it at the time you saw him in May? A. Yes, I did.

Q. When was the next time you saw him, Mr. Hart?

A. The next time I saw him was August 20th. I beg your pardon, the next time I saw him here was August 20th. I saw him in New York on August 13th.

Q. During the time you saw him or had this conversation with him here in May of 1951, was there any discussion with Mr. Lotz about the method under which he was doing business?

A. Yes.

Q. If so, will you state generally what the discussion was?

A. Yes. That was the first time that I personally had any exact knowledge of just how he was conducting the business.

Q. What was the conversation, generally, as best you can, on any subject of the conduct of the agency?

A. Well, several subjects were discussed. I learned from Mr. Lotz that he was what we call buying his business——

Mr. Garrison: I move to strike the answer on the ground that it is a conclusion from the conversation and not [672] what was said.

The Court: State as near as you can what was said between you and Mr. Lotz.

A. Yes, sir. Mr. Lotz told me that he was procuring his business from sub-agents by paying a

(Testimony of Mark Hart.)

commission for it. Mr. Lotz also told me that he had been functioning under this so-called float basis, which was a new term to me. I cautioned him against it.

Mr. Bronson: Q. Did he make plain to you what he meant by float business?

A. Upon questioning, he did.

Q. What did he say?

A. He told me that he would pay the premiums of this particular month, for example, with the company with premium collections applicable to a succeeding month. Of course, that was a diversion known under the term "kiting".

Mr. Garrison: I move to strike that on the ground it is not part of the conversation and not responsive to any question. It is purely a voluntary statement.

Mr. Bronson: It may go out.

Mr. Bronson: Q. Just leave out the conclusion and state the conversation, as the Judge asked you to do. A. Yes, sir.

Q. Did you make any comment in response to that disclosure [673] by Mr. Lotz?

A. Yes, I told him it was unscientific and unsound.

Q. Did any other officer, to your knowledge, see Mr. Lotz during the interval between that meeting and the meeting of August 13th?

A. Yes, Mr. Sudekum, our executive vice-president, called on him in July. I am not sure of the exact date.

(Testimony of Mark Hart.)

Q. Did you make, or was under your instructions any request made in this interval of time for a statement of Joe Lotz' condition?

A. Yes, there was.

Q. His financial condition? A. Yes.

Q. State the circumstances. State what was done.

A. We have a general rule in our office——

Mr. Garrison: (Interposing) I move to strike that——

Mr. Bronson: Q. Just state what was done.

Mr. Garrison: It isn't responsive to any question.

Mr. Bronson: Q. We will get along better if you will just answer the questions, Mr. Hart.

A. Yes.

Q. I know you want to explain matters and give the broad answer, but leave it out.

A. Would you be good enough to repeat your statement?

Q. I wanted to know about any other officer—No, I asked [674] whether there had been any request made for a financial statement?

A. Yes.

Q. When was this?

A. We started in April to request financial statements from Mr. Lotz.

Q. Did you get a statement in April?

A. No, sir.

Q. May? A. No, sir.

Q. Did you get any statement in June or July?

A. No.

(Testimony of Mark Hart.)

Q. Do you know how many requests were made?

A. I can't actually say because they were under our treasury department supervision.

Q. With reference to this meeting in August, the 13th of August, where did that take place?

A. That took place in my office in New York.

Q. Who was present?

A. Mr. Lotz, Mr. Smead, Mr. Sudekum, Mr. Will, Mr. Feller and myself.

Q. Mr. Feller is an attorney from the office that represents you in New York, is that right?

A. That is right.

Q. What is the name of the firm? [675]

A. Boyle, Feller and Reeves.

Q. Will you state the circumstances under which that meeting was held, just briefly?

A. We had been asking Mr. Lotz to remit to us some \$6600 for commissions on a Public Service reinsurance transaction, and when he failed to pay us this money I became concerned because he owed us a large May balance that was to become due on August 15th. I became concerned over the fact that he couldn't pay us a relatively small amount, so I asked him to come to New York.

Q. When you talk about the May balance, what was the credit period or settlement period under your arrangement with Mr. Lotz? What period of time was he given to settle his business in any given month?

A. Our contract called for a 75 day settlement.

Q. So that his May business he should be satis-

(Testimony of Mark Hart.)

ying by the 15th day of August, 75 days after the close of the month of May, is that correct?

A. Yes.

Q. And you say you got concerned because there was an item of \$6600 of reinsurance transactions that he didn't pay?

A. That is right.

Q. And the May balance was how much?

A. Approximately \$66,000. [676]

Q. And that was due on the 15th, two days after he arrived in New York?

A. Yes.

Q. Did you have a discussion there with him on the subject of his finances?

A. Oh, yes.

Q. Were there any representations made to you at that time by either Mr. Lotz or Mr. Smead or both of them as to their financial condition?

A. Yes.

Q. Let me ask you this: Some reference was made earlier to a check of some \$50,301 that wasn't paid for some reason at the bank that was later cleared, do you recall that?

A. Yes, sir.

Q. Was that any concern of yours at that time?

A. No, that matter had been settled.

Q. So it was the fact that there was a \$6600 balance, with a \$66,000 balance shortly to become due, that gave you your concern?

A. That is correct.

Q. Well, now, going down to the discussion there in the office, in your office with you gentlemen present together, what statements were made to you by either Mr. Lotz or Mr. Smead as to their financial condition and obligations and as to their re-

(Testimony of Mark Hart.)

ceivables? Just give us it briefly as well [677] as you remember.

A. Firstly, they told us that they were in process of negotiating a hundred thousand dollar loan at the bank, some bank. They didn't name which one.

Secondly, upon questioning, they told us that a large part of the balance due us, and specifically \$140,000, was uncollected from sub-agents at that moment.

They then said that they had been discussing a 15 per cent prepaid contract with Mid-States, and they were going to check to see their Mr. Titus or Mr. Hatfield, I am not sure which, to try to consummate that arrangement.

Q. Did they make any statement to you as to what receivables they had?

A. Yes, they said it was \$140,000.

Q. And did they make any statement to you about what items they owed out of their business? Any statement on that subject?

A. I cannot exactly recall, Mr. Bronson. We did discuss that fact that at that moment, with their estimate for August, they owed us approximately \$240,000.

Q. That was the amount owing to you?

A. Yes.

Q. Did you at that time come to any conclusion with respect to the financial status of the Lotz agency and their ability to pay out their balances owing to you in [678] the amount of approximately \$240,000.

(Testimony of Mark Hart.)

A. Yes, sir. I felt that while their cash possibly might be strained at the moment, as the result of their large receivables, that there was no great concern because with the loan, with the receivables, with the equity they had in unearned premiums, well, they had ample to liquidate our balance.

Q. When you say their equity in unearned premiums, will you state what that means?

A. Well, under our contract they were guaranteed a minimum commission of 20 per cent of earned premiums, loss ratio notwithstanding, and at that time they had approximately \$300,000 in unearned premium reserve, so disregarding further cancellations, they had equity in their unearned premium reserve of approximately \$60,000.

Q. And when you talk about approximately \$240,000 owing to your company, do you have approximately the amount and the month in which the indebtedness was incurred that made up that sum of \$240,000?

A. Yes.

Q. Will you state that, please?

A. They were indebted to us for \$66,000 for May balances; \$50,000 for June; July was approximately \$80,000; and their estimate of August, of which we had no knowledge, was \$40,000. [679]

Q. And that totals roughly the sum you mentioned?

A. Yes.

Q. When you say they estimated \$40,000 for August, that was made in the middle of the month ostensibly on the basis of continuing the same

(Testimony of Mark Hart.)

amount of underwriting for the remainder of the month?

A. Yes. July was \$80,000 and they felt that was 50 percent of the business.

Q. A point was made a minute ago, in discussing their condition at that time they informed you they were in the process of making or about to make a prepaid commission arrangement with Mid-States Insurance Company. A. That is correct.

Q. Was any discussion had between them and you on the subject of the American Fidelity and Casualty making a similar arrangement with them—with Lotz? A. Yes, there was.

Q. What was that discussion?

A. Mr. Lotz stated that his operating experience with us was more satisfactory to him, he would like to continue with us, and asked if we wouldn't extend him a 15 percent prepaid commission.

Q. What did you tell him?

A. I told him it was not within our power to do so since our managerial contract does not permit us to pay prepaid [680] commissions.

Q. Was there any discussion whatever in that meeting with respect to the cancellation of the Lotz Agency by American Plan? A. No.

Q. Was there any decision in your mind at the time to take such action? A. No.

Q. There has been some reference made to some bits of conversation that are claimed to have taken place at that meeting. One of them had to do with

(Testimony of Mark Hart.)

what I will designate a so-called station to station call incident.

Do you recall a telephone call Mr. Lotz made from your office to Chicago?

A. Yes, I do.

Q. To Mid-States Insurance Company during that August 13th meeting?

A. Yes, sir.

Q. State what happened?

A. Mr. Lotz said that when he got back to his hotel he said he was going to call Mid-States, and I don't recall whether he said he was going to set up a station to station call with Mr. Titus or Mr. Hatfield, and I said, "You can use the phone here, Joe."

Q. Who ordered the phone call put in? [681]

A. I did. I used my extension and called my operator to get Mid-States Insurance Company.

Q. Was there any statement by you at that time, or preceding that or afterward or at any time in that meeting about putting in a station to station call so that the people on the other end wouldn't know where the call originated?

A. No, sir.

Q. As a matter of fact, do you know—were you present in Court when—strike that.

Do you know that Joe Lotz informed the Mid-States when he was talking with Mr. Hatfield there and Mr. Titus the day following that he had just called from your office? Do you know anything about that?

Mr. Garrison: That is objected to on the ground

(Testimony of Mark Hart.)

that it calls for hearsay as far as Mr. Hart is concerned.

Mr. Bronson: I am afraid it did.

Mr. Garrison: He wasn't present in Chicago.

Mr. Bronson: The question is withdrawn.

Mr. Bronson: Q. Another subject that has been brought up here was in reference to a Mr. Cass. He is the same gentleman whose deposition I read this morning, is that true? A. Yes, sir.

Q. Will you state whether there was any conversation during the time Mr. Smead and Mr. Lotz were there about going to see [682] Mr. Cass?

A. I cannot recall ever hearing any such conversation.

Q. Was there any reason known to you, any fact known to you that would suggest that you tell either Mr. Lotz or Mr. Smead not to see Mr. Cass when they went to Chicago?

A. No, sir. On the contrary. Mr. Cass wasn't friendly with Mid-States.

Mr. Garrison: I move to strike that on the ground that is another example of a voluntary statement, not responsive to the question about the conversation.

The Court: It may go out.

Mr. Bronson: Q. You are familiar with the statement made by Mr. Smead in writing, which is in evidence here, that purports to have been taken in Oakland about December 6th? A. Yes.

The Court: It is twelve o'clock. We will take a recess until two o'clock.

(Whereupon an adjournment was taken in this cause until two o'clock this same day.)

MARK HART

a witness called on behalf of the defendant, having been previously duly sworn, testified further as follows:

The Court: Proceed.

Direct Examination—(Continued)

Mr. Bronson: Q. Before taking up the statements, some of them, in the so-called December 6th meeting statement, there are one or two matters which I overlooked, to which I will direct your attention. Sometime in his testimony Mr. Smead stated that there was a dinner meeting in New York following the meeting in your office, when Mr. Lotz, Mr. Smead, and some of you, including you, were present. Was there such a dinner meeting?

A. Yes, there was.

Q. He stated—I am not giving his language exactly—"It all depends on Mid-States continuing to do business with Lotz." Do you recall any such statement as that?

A. No, sir, I do not.

Q. Do you have any recollection of the dinner meeting partaking of any business discussion at all?

A. No, to my best recollection it was purely a social meeting.

Q. He states in that same statement that Mr. Sudekum made [684] a statement, "What happens if Mid-States discovers our position?" Or similar

(Testimony of Mark Hart.)

language. You were alleged to reply, "I will worry about that when the time comes." Was there any such statement that you heard from Mr. Sudekum that you recall?

A. No, sir, that statement nor reply was never made.

Q. Did you make any statement that you would worry about that when the time comes?

A. No, I did not.

Q. He stated, whether it was in connection with that meeting or a later meeting—I am referring to Mr. Smead—the idea was to apply Mid-States premiums to pay off American Fidelity and Casualty. Was any such idea expressed by anybody at the meeting in New York?

A. None whatsoever.

Q. At the meeting in Oakland? A. No.

Q. Mr. Smead's statement of December 6th contains a number of matters that I have already reached, and I will go to those that I have not spoken of, leaving out, your Honor, a great many as to which there is no quarrel with whatever. I will endeavor to reach all of the matters that are otherwise. Mr. Smead's statement of December 6th states that you asked them the amount of their receivables and they answered \$75,000. Did you ask them the amount of their receivables?

A. Yes, sir, I did. [685]

Q. What was the response given by Mr. Smead or Mr. Lotz?

A. They estimated that it was around \$140,000.

(Testimony of Mark Hart.)

Q. Did that represent Mid-States premiums due?

A. Oh, no, it was American Fidelity and Casualty.

Q. The American Fidelity and Casualty?

A. Yes, sir.

Q. Nothing else?

A. To the best of my knowledge there was nothing else.

Q. Was the figure of \$75,000 in that connection mentioned by you at all or by Mr. Smead or by Mr. Lotz?

A. No, sir.

Q. Mr. Smead's statements to the effect that the American Plan through you instigated Lotz going to Mid-States to get a volume of business from them so that out of the collections of premiums made for them you could be paid off the amount of indebtedness due to the American Plan. Was that idea expressed by anyone at the meeting in New York?

A. No, sir, it was not.

Q. Or at the meeting in Oakland?

A. No, sir.

Q. Was the meeting in Oakland on August 22nd, 1951, that is, the 20th to 22nd, the last time that you were in Oakland during that year?

A. Yes, sir. [686]

Q. That was the last time you were in Oakland?

A. During that year.

Q. You stated this morning that Mr. Lotz or Mr. Smead, one or the other, stated to you they already had an arrangement in process with the Mid-States

(Testimony of Mark Hart.)

for the continuation of business on a prepaid commission basis, is that true? A. They did.

Q. His statement further goes on and states that, you stated if Lotz could not get Mid-States to write Lotz' business, that you, Mr. Hart, had another carrier in mind. Is that statement true or false?

A. That is untrue.

Q. Mr. Smead's statement says that you told Joe Lotz to tell Mid-States when they got to Chicago that he had been in New York looking for a better deal, but that the American Plan would not give it to Lotz, and so Lotz wanted to resume writing in Mid-States. Was any such statement as that made by you or was any such suggestion made by you? A. No, sir, there was not.

Q. Do you state in that connection that it was they who told you the deal that they already had in the making calling for a prepaid commission?

A. That is right.

Q. Just pausing on that for a minute, is a prepaid commission customary in this retrospective plan of operating? [687]

A. I would say it is the exception rather than the rule.

Q. He states in the statement of December 6th, Mr. Smead, that Hart told Lotz to call him immediately from Chicago so that Hart would know if Mid-States was willing to go along, and that you, Mr. Hart, gave Lotz your home telephone number. Is that statement true?

(Testimony of Mark Hart.)

A. That is untrue. I went out of town right after that meeting.

Q. Did you make any request of either Lotz, that is, Mr. Lotz, to call you or notify you of the outcome of his meeting in Chicago?

A. No, I did not.

Q. Mr. Smead says in his statement that you arranged travel for him to return to Oakland and also for Mr. Lotz to go to Chicago the following morning?

A. Yes, sir, I did. That is a courtesy we extend to all visitors.

Mr. Garrison: If the Court please, I move that that last be stricken out as not responsive to the question, a purely voluntary and self-serving statement on Mr. Hart's part.

Mr. Bronson: About the courtesy?

Mr. Garrison: About the courtesy extended to his office.

Mr. Bronson: That is all right, if you want it to go out. [688]

Q. But you did make those arrangements, did you? A. Yes, sir, I did.

Q. His statement also says, Mr. Smead's, that he went back to California and that on the 15th or 16th of August—that would be removed by that from the 13th—collections were not good, so he received from Mr. Hart that Mr. Hart and Mr. Feller would come to California on August 20th. Is that a true statement?

A. I do not know if that date is correct, Mr.

(Testimony of Mark Hart.)

Bronson. It seems to me that it was the 17th of August, but I may be incorrect, when he received word from my office—I was not in the office then—that I was coming with Mr. Feller.

Q. What was the situation? Did you plan to go solely to see those people when you came to California?

A. I did—not solely. We had some arrangements to consummate on another matter in Los Angeles.

Q. When you say “we” you refer to whom?

A. I asked Mr. Feller to come along with me.

Q. Was that some other business——

A. Some other business in Los Angeles, yes, sir.

Q. Were there any conversations between the time that you had this meeting in New York on the 13th and the time that you arrived here in Oakland on the 20th between you and Mr. Smead or you and Mr. Lotz about the progress of collections on your account? [689]

A. I don’t believe so, not with me personally.

Q. Any with your office that were brought to your attention?

Mr. Garrison: Pardon me, I did not hear your question.

Mr. Bronson: I asked him if there were any conversations back and forth between the 13th and the 20th of August, and the answer was “Not with me personally.”

The Witness: I am not quite certain of those dates.

Mr. Garrison: I beg your pardon?

(Testimony of Mark Hart.)

The Witness: The dates are a little hazy to me. I doubt it was, because my recollection is I was out of town during that period of time.

Mr. Bronson: Q. When Mr. Smead left to go to Oakland from the meeting on August 13th, had he made any representations to you about collections and his own activities in collecting on your accounts? A. Yes, sir, he had.

Q. Did you get any report on that, either directly or through anybody in your office, emanating from Smead as to the success that he had had in that regard?

A. I believe that on August 17th or thereabouts Mr. Will, our vice-president and treasurer, received information from Mr. Smead to the effect that he was only able to collect about \$8,000.

Q. Was there any report in that interval of time about what success they had had in making a loan? [690]

A. Yes, they felt that the loan situation did not look favorable.

Q. What, if any, influence did those two disclosures have in your making a trip out to Oakland on the 20th?

A. Well, it gave me some cause for concern, which I had not had heretofore, heretofore meaning the meeting of August 13th, and I thought it would be best, since I was going to California, to go to Oakland first.

Q. Going down Mr. Smead's statement he says—this is the December 6th statement—that during the

(Testimony of Mark Hart.)

\$50,000 loan, while you were out here? I am going to interrupt a moment to say that the last thing that had come to your attention was some information given to Mr. Will that they were not having much success with their loan. Was that before you got there? When you got out here with Mr. Feller? Just state briefly the activities of yourself and Mr. Feller on that loan.

Q. When I got out here the first thing we found out was they were talking about a loan of \$50,000 instead of a loan of \$100,000. I did learn that Mr. Mead was trying to arrange the loan for them, and I did volunteer to go over to the bank with our counsel, Mr. Feller, and execute any [693] documents with the bank to indicate our willingness to assign commissions due Mr. Lotz to the bank as collateral security in consideration for that loan.

Q. Stopping you there, under your arrangement with Lotz he earned a 20 percent commission?

A. That is correct.

Q. Loss ratio high, loss ratio low, and he could assign, or rather you could assign and agree to assignment, his assignment to the bank of that 20 percent as collateral, right?

A. That is correct.

Q. What happened at the bank when you put that up?

A. Mr. Feller and I met with the loan officer and it boiled down to the question of whether the collateral would be diminished by subsequent—

Mr. Garrison: If the Court please, I think we

(Testimony of Mark Hart.)

are getting into the realm of hearsay. I think we stipulated the loan was not made, if the Court please, and that is the ultimate fact.

Mr. Bronson: Yes, you are hurrying me a little, counsel. If you will just state what was said, rather than it boiled down to this. That is not a fact.

Mr. Garrison: We object to what was said between Mr. Hart and somebody at the bank because unless we were present, it would certainly be hearsay as to us, if the [694] Court please.

Mr. Bronson: I do not agree with counsel, but I think I should ask this.

Q. Was anyone else there besides the bank officer, you and Mr. Feller? Was Mr. Lotz and Mr. Smead there, in other words?

A. I don't believe Mr. Lotz and Mr. Smead were there. Mr. Feller and Mr. Earl Smith, assistant vice-president of the bank, the loan officer and myself.

Q. Were you successful in getting a loan or, rather, securing a loan for Lotz?

A. Ultimately no, but when we left the bank we had no way of knowing.

Mr. Garrison: If the Court please, I move that the statement be stricken out on the ground that Mr. Hart is self-serving himself by this voluntary statement.

The Court: The ultimate fact is they did not get the loan. The rest may go out.

Mr. Bronson: Q. When you got there did you make any examination of the books of the Lotz agency? A. No, I did not.

(Testimony of Mark Hart.)

Q. Did Mr. Feller? A. No, he did not.

Q. Did you engage anyone, whether in Lotz employ or an outsider, to attempt to get a current statement off the [695] books of Lotz?

A. No, sir.

Q. Mr. Smead's statement contains this statement. He says when you were there, and before you left, an envelope, sealed envelope marked "personal" containing a letter and a check for \$1,000 was handed to Mr. Smead, is that true?

A. Yes, that is true.

Q. Had the agreement of August 22nd been executed at that time? A. Yes.

Q. That was the arrangement, the exhibit that is in evidence here?

A. Yes, sir, it was.

Q. Where was that agreement signed?

A. At the office of the Central Bank in Oakland.

Q. Was a copy of it left there?

A. Yes, sir, it was left with Mr. Smith.

Q. Had this letter and check been drawn up at that bank or was that done aside from that proceedings?

A. There was no check, Mr. Bronson.

Q. What was it? A. A letter.

Q. Wasn't there an offer of \$1,000 in there?

A. Yes, that is right. [696]

Q. It was not a check?

A. It was not a check. It was an offer.

Q. What was the reason that you sealed that and handed it to Mr. Smead?

(Testimony of Mark Hart.)

A. Mr. Smead was an employee of Mr. Lotz, and I thought it would be rather delicate for Mr. Smead, for his employer to know we were giving him extra compensation for the extra work he had to do.

Q. Did you ask him not to show it to Lotz?

A. No, sir.

Q. What was the nature of the extra work you anticipated Mr. Smead would have to do?

A. Well, primarily we appointed Mr. Smead to supervise our funds, insofar as Mr. Lotz' office was concerned, which we felt would entail a considerable amount of extra work on his part, perhaps involving even night and weekend work, and we felt it fitting and proper to reimburse him for that work.

Q. Mr. Smead's statement in respect to that says that there had been no previous discussion of this matter of reimbursing him for the extra work cast on him in supervising your accounts here, is that true?

A. I believe he is correct in that we did not discuss reimbursing him, other than the night before we did ask him, did tell him that we would like him to handle our business [697] for us.

Q. With reference to the fact that he called you up when you were in Los Angeles and said he would not accept your offer of \$1,000, is that true?

A. Yes, that is true.

Mr. Garrison: I think the statement was that he would having nothing whatever to do with it, Mr. Bronson.

Mr. Bronson: Yes, but I heard Smead say that,

(Testimony of Mark Hart.)

and you will pardon my doubt of the veracity of the man when it comes to putting conversations like that.

Q. Next Smead says that the rewrite of the Public Service policies in Mid-States did not occur until the first week in September, and that you called numerous times and wanted to know how long it would take to rewrite the business and when you could expect the money from them. What is your comment on that part of Mr. Smead's statement?

A. I think in essence that that is a correct statement, but any reference made by me to Public Service money was made with respect to Lotz' commission thereon, which we wanted.

Q. You terminated the agency arrangement with Lotz while you were here, did you not?

A. Yes, sir.

Q. And you have seen the letter here that terminated it? A. Yes.

Q. What were your reasons for terminating the agency [698] arrangement with Lotz?

A. By the time I arrived here I was—or when I arrived here, rather, I was informed that Mr. Lotz had consummated a new agency agreement with Mid-States which called for a prepaid commission of 15 percent and a 14 percent retention. Our retention was 15 percent with no prepaid, although we did have the 20 percent guarantee unearned premiums. We could not give the prepaid commission because it is not within the scope of our manage-

(Testimony of Mark Hart.)

ment contract, and hence I felt that to continue along with Mr. Lotz would result in our probably getting a portion of the business that would be the unfavorable portion. I didn't want to leave ourselves in that position.

Q. Your 20 percent commission guarantee is payable not at the writing of the business, is it?

A. No, sir.

Q. How is it payable?

A. It is paid on an earned premium basis on exactly the same way that the retrospective commission is calculated.

Q. Did the fact that the loan that you had expected, first in the stated amount of \$100,000 and later in the amount of \$50,000, had not matured, have a bearing on the cancellation? [699]

A. On the termination of the agency agreement?

Q. On the termination of the agency agreement.

A. Yes, I think that influenced me, too.

Q. What is the policy of your Company, if you have any, about having an outstanding agency arrangement where you expect no business or expect highly substandard business?

Mr. Garrison: That is objected to on what the policy of the company might be is immaterial. The issue here is what did they do with respect to Mr. Lotz.

The Court: We are going afield, aren't we?

Mr. Bronson: Q. I asked you sometime ago about this \$50,000 loan that failed at the bank while you were here. Was there subsequently an advance

(Testimony of Mark Hart.)

made, at least as a credit, to Mr. Lotz, to tide him over by the American Plan?

A. Yes, sir, there was.

Q. How much was the amount of that credit?

A. It came down to \$38,000 or \$39,000, rather than the \$50,000 which we thought we would need to satisfy our company, that is the American Fidelity and Casualty Company.

Mr. Garrison: I move that the latter part be stricken out, if your Honor please. It is not responsive to the question. The question was, as I understood it, how much was the loan actually, and he said \$38,000. That, I think, is the answer. The latter part then is an explanation of what he did.

The Court: It may go out, what he thought.

Mr. Bronson: Q. Mr. Hart, was that handled by paying cash to Mr. Lotz? A. No, sir.

Q. How was it handled bookwise?

A. We actually credited Mr. Lotz with the \$38,000 or \$39,000, it may have been, and that, together with the \$24,000, which he paid us out of his trustee account while we were here and a previous commission due him of \$4,300, made up his May balance of \$66,000, which was due to us from the American Fidelity and Casualty Company.

Q. In other words, the American Plan owed the American Fidelity and Casualty that much money for the settlement of the May balance of Joe Lotz to that company, is that true?

A. May I qualify that?

Q. Yes, go ahead.

(Testimony of Mark Hart.)

A. I should not have said that American Plan owed it. Actually we are only responsible to the Company for what we collect. But the insurance department of the State of New York does not permit an insurance company to take into consideration any receivable that is in excess of 90 days old, and in order that the insurance company might not have a non-admissible item of this nature, American Plan advanced the \$38,000 so that we could pay the entire [701] \$66,000 to American Fidelity and Casualty Company.

Q. Pursuing Mr. Smead's December 6th statement, he next says that Hart instructed him to deposit any checks received from the Public Service business to Lotz trustee account and then issue a check to American Plan from that account. What is the fact in that respect?

A. That is not true.

Q. Did you give him any instructions about Public Service money? A. None whatsoever.

Q. He states next in his statement that Lotz and he told you, Hart, that they would owe Mid-States \$29,000 on September 15th for settlement of June business and that you, Hart, wanted it paid. What is the fact in that regard. Was that subject discussed between you and Smead?

A. Yes, we did have a discussion about that. He informed me that he had a \$29,000 balance due Mid-States and asked me what to do about it, and I said, "If you owe it to them, you will have to pay it."

(Testimony of Mark Hart.)

Q. From the time you left Oakland on the 20th of August up to that date, which must have been near September 15th, the settlement date, on the \$29,000, had you been communicating either by teletype, telephone or telegram with Oakland, with Lotz' office? A. Yes, sir. [702]

Q. Will you tell the Court how many times, weekly or daily, you called them during that interval?

A. Oh, I can't put my finger on it. At least once a day and sometimes as many as three times a day.

Q. Were you riding hard? Were you pressing them? A. Yes, I was.

Q. Were you trying to collect your balance?

A. Yes, sir.

Q. Were you meeting resistance on their end of it?

Mr. Garrison: That is objected to, if the Court please. The teletypes speak for themselves. It is a conclusion on his part. I think the Court is going to have to decide how hard he was pressing him.

Mr. Bronson: The teletypes are not the whole story. The witness has just said, as I understood him——

Q. Did you telephone besides teletype?

A. Yes, there were many telephone calls.

Q. Did you send wires?

A. I believe there were some wires.

Q. You were trying to to get your balance collected, is that right? A. Yes, sir.

(Testimony of Mark Hart.)

Q. On a debtor, relations with whom had ceased and terminated on August 22nd?

A. That is correct. [703]

Q. About this \$29,000, did you have any idea in your mind about lulling Mid-States into a further state of somnolence by letting Lotz feed \$29,000 to him?

A. I had no ideas along those lines whatsoever.

Q. Mr. Smead closes his December 6th statement by saying that about November 1st he telephoned to you about the \$60,000 balance that was then owing by Lotz Agency to American Plan and asked about the policy of reinsuring that amount with Mid-States, and he further says, Mr. Smead does in his statement, that you told him that under the New York law reinsurance was not permissible. Now, up to that point in this part of Mr. Smead's statement is it true or false?

A. I believe that is true.

Q. What is the situation that prevents reinsurance as distinguished from rewriting insurance under the New York law?

A. Mr. Bronson, it does not actually prevent it, but a New York Company that seeds all or part of its business with a company not authorized to do business in New York is penalized to the extent that the liability for unearned premium reserve is not permitted to be reduced and hence it is a punishment to surplus. So in essence insurance companies in New York desist from reinsuring with non-admitted companies. [704]

(Testimony of Mark Hart.)

Q. I take it from that that Mid-States was not admitted in New York?

A. It was not at that time, I do not believe.

Q. Mr. Smead goes on in that regard and says during a telephone conversation that you suggested that the \$60,000 or \$61,000 be rewritten in Mid-States and that you told Smead to call Hatfield in Chicago to arrange it. Is that a true statement?

A. Not exactly.

Q. State what happened in that particular regard, the telephone call to Hatfield?

A. This telephone call that I made to Mr. Smead was one in which I told him that there were some 60 or \$70,000 of remaining balance left, of unpaid balance remaining. He told me that they were not able to pay, but he said, "I have had some conversation with Mr. Hatfield about reinsurance. I said, "We can't reinsure for the reasons I have just given you, although I didn't get technical with him, but on a rewrite basis it would be all right." Then he said, "I am sure it is all right with Mr. Hatfield." And I said, "I can't do that unless I first clear with Mr. Hatfield and get his authority to cancel and rewrite."

Q. Is that the basis for the telephone call that you had with Mr. Hatfield that was read earlier in this trial, the one that is on a disk, and the transfer to the disk is dated [705] October 31st, 1951?

A. Yes, sir, that is the basis for it.

Q. And the conversation that you had with Mr.

(Testimony of Mark Hart.)

Hatfield there transpired out of those circumstances? A. Yes, sir.

Q. That bunch of policies that were cancelled were cancelled flat, were they?

A. That is correct.

Q. And if they had an unexpired term, the new policy was to be written to pick up the balance of the terms specified in the old policy, or did they revert back to the beginning of the period?

A. A flat cancellation means a cancellation from inception date. So the Mid-States policies were to take up from the inception date.

Q. Is that the group of policies that was referred to by Mr. Titus here this morning in a conversation he had with you early in December?

A. Yes, sir.

Q. Is that the first time that you learned that the cancellation notices of those policies had gone out to the various policyholders but had not been accompanied or even followed by the new policies?

A. You mean my conversation with Mr. Titus?

Q. Yes. [706]

A. No, I heard that on the same day from Mr. Smead, prior to Mr. Titus' telephone call to me.

Q. Let me ask you this: Had you heard from any of the policyholders?

A. Oh, yes, we had several complaints from policyholders and sub-agents wanting to know why we did not cancel their policy and replace it with a Mid-States policy.

Q. So it was a live question whether they were

(Testimony of Mark Hart.)

going to do what Mr. Hatfield said they were going to do or whether they were going to sit on it?

A. Yes.

Q. When reference was made by Mr. Titus about some trouble you might get into with the California Insurance Department, you recall that part of the conversation, do you? A. Yes, sir.

Q. Was that a live question too? Would that be a matter of interest to the Commissioner here?

A. I think that would be a matter of interest to the Commissioner.

Mr. Garrison: May the latter answer go out for the purposes of making an objection, your Honor?

Mr. Bronson: All right. I know Mr. Garrison, having been an insurance commissioner, can probably answer that.

Mr. Garrison: That is quite beside the point, but the [707] question was leading and suggestive and calls for an opinion about what the Insurance Commissioner might think, which would be wholly irrelevant in this case.

The Court: It may go out.

Mr. Bronson: I think that is right, but I want to ask the witness this:

Q. As a matter of your experience, thirty years in this business in a good many States in the Union, in your opinion, would the cancellation of a policy and then a long delay in issuing the rewritten policy be a matter of concern to an insurance commissioner?

A. My experience is, yes, it would be.

(Testimony of Mark Hart.)

Q. What about the poor policyholder? Would it be a matter of concern to him to get a notice, for instance, on October 31st that his policy was cancelled and then go down to the end of December and not have your new policy? Would that be a matter of concern to the policyholder?

Mr. Garrison: That is objected to on the ground it is totally incompetent, irrelevant and immaterial, to determine whether or not there was fraud committed in this case, the state of mind of the holders of policies.

Mr. Bronson: I do not know who committed the fraud.

Mr. Garrison: The Judge will decide that, but that seems to me to be totally without the issues of this case.

(Question read.) [708]

The Court: The objection may be overruled. You may answer.

A. It would be a very serious matter of concern to the policyholder, I should think.

Mr. Bronson: Q. Mr. Smead has said here, in one of these statements, that you told him to destroy the teletype messages that you had sent out here, is that true? A. That is untrue.

Q. As a matter of fact, they were not destroyed, Lotz' copies, were they?

A. Not to my knowledge.

Q. And yours were not destroyed, were they?

A. No, sir.

Q. When you got a copy of an order of this

(Testimony of Mark Hart.)

Court to deliver up certain documents within the period beginning before and ending after, you delivered your own teletypes to the attorney for the Mid-States, did you not?

A. Yes, sir, I did.

Mr. Bronson: That last statement of Mr. Smead's was in that amendment of December 7th, the short one, your Honor. Now I am turning to Mr. Smead's statement of December 18th, 1951, in which he says that on August 20th,

"When you came out here from New York with Mr. Feller, and while you were in Mr. Lotz' offices, you asked me to furnish you the figures showing the [709] total premiums payable to our companies and total receivables," and that Smead spoke to the three bookkeepers mentioned, and that a tape was run to furnish the information, which was total premiums payable \$287,000, total receivables, \$75,000. What is your comment about the truth or falsity of that statement?

A. That is not a true statement.

Q. Is there any explanation that you would care to make in that connection?

A. I would like to.

Q. Go ahead with it.

A. I asked Mr. Smead to furnish me, not with a tape, but with a listing and a breakdown by sub-agents of the receivables that were due his office.

Q. On what business?

A. On our business, the American Fidelity and Casualty business. I did this so I could take it back

(Testimony of Mark Hart.)

to New York, and in the event Mr. Smead was not successful in collecting or not aggressive enough in collecting from the sub-agents, that we would attempt to collect——

Mr. Garrison: I move, if the Court please, the reasons why he did it be stricken out as not responsive to the question. He was instructed to confine his testimony to the conversation with Mr. Smead. What might have been motivating him is something that I do not think he ought to interpret. [710]

Mr. Bronson: I know of no such rule of law, your Honor. If there is anything of assistance to the Court in determining——

The Court: The Court is prepared to rule. If he wants to explain his answer, he may.

The Witness: I wanted this listing of receivables broken down by sub-agents so that we from New York could effect a cancellation—I am sorry—effect collection of these items in the event that Mr. Smead was not aggressive enough in doing it, and failing to collect, we could cancel the various items.

Q. Did the breakdown of the information that you have just mentioned refer to any particular sum of money that was then due you from the Lotz Agency? A. Well, yes.

Q. What was the sum then due?

A. \$240,000 less whatever he had remitted to us between August 13th and August 20th, and I think it was about \$8,000.

Q. Mr. Smead's December 18th statement makes this statement, that on August 21st, during that

(Testimony of Mark Hart.)

same year, you asked him to compile a list of policy numbers, names of insured, amount of premium and individual agents; the unpaid American Fidelity refers to those receivables, and that this information [711] was compiled by the two women mentioned, and that Smead recalls that the total receivable was \$51,000. What do you say as to the truth or falsity of that? A. That is untrue.

Q. You stated that you recollect asking for a breakdown by policy numbers and insureds.

A. No, sir.

Q. You wanted to know the names of the agents for collection purposes? A. That is right.

Q. Was any breakdown of policy numbers, the names of the assured given you there?

A. No, sir.

Q. Was any tape run on the amount of total premiums payable and total receivables?

A. No, sir.

Q. Was any statement or any figures supplied to you by Smead showing that the total receivable figure was \$51,000? A. None whatsoever.

Q. What was the total receivable at that time, according to your calculation, referable to American Fidelity and Casualty?

A. I do not know the exact amount, Mr. Bronson, but it was \$140,000, according to their statement of August 13th, less whatever they had collected between August 13th and the date I was out here. [712]

Q. Now I am referring to the long typewritten

(Testimony of Mark Hart.)

statement taken in Mr. Garrison's office which is undated but apparently followed within a day or two after those I have referred with the December 6th and 7th dates. That statement says between December, 1950, and September, 1951, practically all the business written by Lotz was placed with the American Fidelity. Is that true?

A. That is untrue.

Q. The statement says that it was at your insistence that most of the business was placed with the American Fidelity. Is that true?

A. It is untrue.

Q. Did you make any statement on that subject to Mr. Lotz? A. Yes, sir, I did.

Q. What did you tell him and when?

A. In May of 1951, my first meeting with him.

Q. What did you tell him?

A. I told Mr. Lotz that we were not premium hungry, that we did not want all the business that he had, and that he should split with Mid-States. He told me that he preferred our company. He liked the way we did business. Nonetheless, I said, "Mid-States was your first carrier. We don't want all your business."

Q. Did you have any communication with Mid-States through Mr. Cass or any persons before you started writing business [713] on that subject?

A. Along those lines, yes, sir.

Q. The statement refers to the history of Lotz' bank account. I am referring to the statement that was made in Mr. Garrison's office. It refers to the

(Testimony of Mark Hart.)

history of Lotz' bank account with the Anglo, next with the Central, and then with the Anglo again. Do you remember that part of the statement?

A. Yes, sir.

Q. Did you ever have any knowledge of the change in the trustee account in the Central Bank over to the Anglo Bank, which apparently was made sometime along the end of August, 1951?

A. I never had any knowledge of that until this action was started.

Q. And that was the action brought by Mid-States against the Anglo on some checks that were claimed to have been cashed without proper authority?

A. Yes, sir.

Q. That is the first you knew that there had been a switch of the trustee account from the Central to the Anglo, is that right?

A. To my best recollection that was the first time.

Q. Is that referred to in the agreement that you had made with Lotz on August 22nd? There is a reference in there, [714] isn't there, that he has to retain his account in the Central Bank as a trustee account?

A. That is correct.

Q. There was no attempt made to seek your consent to that, then, prior to making the switch in the account?

A. No, sir.

Q. The statement contains then, that on August 20th Mr. Feller and yourself arrived in Oakland and made a thorough check of the books of the

(Testimony of Mark Hart.)

agency. I believe I have asked you about that already. A. You have, and it is untrue.

Q. Did you make any check on any of its accounts? A. None whatsoever.

Q. Did you take a look at them sufficiently to know whether his accounts were being kept up or badly behind? A. No.

Q. The statement says that at the time the \$66,000 for May, that is, due to your company, was still unpaid. That refers to the time that you came out here to Oakland?

A. I believe that is correct.

Q. And that was a balance that had fallen due, that is, the May business, on August 15th?

A. That is correct.

Q. And so it was about five to seven days overdue at that time? [715] A. Yes, sir.

Q. Does the same comment apply to the \$6600 due on the reinsurance transaction?

A. That was still unpaid.

Q. That statement says that you and Mr. Feller, when you were in Oakland, advised of the proposal to rewrite the business of the Public Service and the fact that the premiums therefrom would be used to reflect Joe Lotz' balance due American Fidelity; is that statement true?

A. It is partially true. We were advised of the Public Service rewrite, but nothing was talked about using their premiums for our balance.

Q. Did you propose that they invade the pre-

(Testimony of Mark Hart.)

miums, that is, the prepaid commission that they got out of it, to pay the account with you?

A. I did not.

Q. Did Mr. Feller do any such thing?

A. No, sir.

Q. He says in there, too, Mr. Smead, this again, that you were not to let Mid-States know of your part in that transaction, is that true?

A. That is untrue.

Q. Did you have any part in the transaction?

A. None whatsoever.

Q. Mr. Smead's statement says that you had instructed him [716] and Lotz to deposit all funds received from Public Service, and it has the same thing about washing premium payments from Public Service through the trustee account in the American Fidelity in the same bank and then to divert it to you, is that statement true?

A. That is untrue.

Mr. Bronson: Those are brief, your Honor, because many of the statements are covered in the previous one. I am going to take up these teletypes, but I will defer that and go into something else here. That will utilize too much time.

Q. Some reference has been made in the testimony here to a sum of around 10 or \$11,000 on the runoff of the Joe Lotz business with American Fidelity and Casualty that is due to Joe Lotz. Do you recall that testimony?

A. I do recall it, yes.

Q. Is it true that there was on the runoff of the

(Testimony of Mark Hart.)

business itself a balance of that amount resulting from the audit of the books?

A. That is correct.

Q. Were you informed at any time after the runoff or before that Joe Lotz had made an assignment of his entire affairs to the Mid-States sometime in the latter part of the years 1951?

A. Yes, I believe that counsel for Mid-States sent us a [717] copy of that assignment.

Q. Did he accompany it with any letter indicating that it was to put you on notice that any funds in the hands of your company that belonged to Joe Lotz or might belong to Joe Lotz, they claimed it under the assignment?

A. I believe a letter of that type did accompany the assignment, yes.

Q. Have you learned at any time since the date that that assignment bears Joe Lotz repudiated the assignment and claimed any funds in your hands belonged to him as his own?

A. Yes, Mr. Lotz' attorney notified us that the assignment had been repudiated.

Q. And you have been holding that amount since? A. Yes, sir.

Q. Have you informed any official of Mid-States of that fact?

A. I am not certain but I seem to recall that I did.

Q. Additional to that are there any charges that you assert under the August 22nd, 1951 agreement or otherwise against that fund?

(Testimony of Mark Hart.)

A. Yes, sir, we assert charges for any legal right we may have to offset against that fund.

Q. So there are in effect about three claims on that fund. Is that about the fact of it? [718]

A. Yes, sir.

The Court: We will take a recess.

(Recess.)

Mr. Bronson: Q. You have stated, Mr. Hart, that when you got out here on August 20th, 1951, there was the balance owing by the Lotz Agency to American Plan of approximately \$240,000 less about \$8,000 of collections that had been effected in the week intervening between the New York visit and that date. Now, when you were in Oakland with Mr. Feller and were seeing Mr. Lotz and Mr. Smead, was there any discussion between you and them, and any plan formulated for the pay-off of that amount of something over \$230,000, and was anything done for payment on account immediately? Will you discuss that as briefly as you can, if there was such a discussion and plan?

A. As I recall, Mr. Bronson, during our visit, Mr. Lotz had a balance in his trustee account of approximately \$30,000, and he gave us \$24,000 of that \$30,000. The receivables were purported to be \$140,000 and that, when added to the \$24,000, made \$164,000, which when deducted from the \$240,000 that he owed us, left about \$76,000. We had created in New York a commission credit to Mr. Lotz of \$20,000.

Q. That was in the normal system of accruals?

(Testimony of Mark Hart.)

A. Yes, as commission earnings, which brought the balance [719] down to \$56,000. It was my thought that this \$56,000 could be liquidated in several ways: One, by virtue of the commissions he was receiving under his original retrospective contract with Mid-States, which he told us was running about \$9,000 a month.

Q. His commissions?

A. Yes, sir, as retrospective commissions, that Mid-States, he told us, was running about \$9,000 a month. Two, from the 15 percent prepaid commission earnings on Mid-States business; three, from the fact that a loan was still in process of negotiation; and finally he had an equity in our unearned premium reserve of some \$60,000. All of that would more than normally liquidate, more than adequate liquidate the \$56,000 that remained as a result of this calculation.

Q. Would any arm of that scheme or system of liquidation involve an invasion of the premium accounts of Joe Lotz with other companies?

A. No, sir, it would not.

Q. I may as well ask you this: Was there ever any suggestion made by you or Mr. Feller, statement, verbal or in writing, that to pay you off, you required Joe Lotz to invade premiums belonging to other companies?

A. No, sir.

Q. Now, the Court has among the exhibits a series of teletypes. Before I go to that, however, and on the subject [720] of the switch in the account from the Central Bank to the Anglo Bank, I will

(Testimony of Mark Hart.)

ask if you know of the communications sent to Joe Lotz by letter from the treasurer of your organization under date of August 2nd with respect to the use of the account in the Central Bank, that testimony has been taken on, that is, the account standing in the name of the American Fidelity and Casualty Company. Do you know of such a letter?

A. I think I am familiar with that situation.

Q. I will show it to you in a minute. As a matter of fact, when first was that account established, the one standing in the name of American Fidelity and Casualty?

A. I am not sure of the date, Mr. Bronson, but it was perhaps in April or May, 1951, when we opened up a complimentary account at the Central National Bank in the name of the American Fidelity and Casualty for a round sum. I believe it was \$25,000. And, as I say, it was complimentary to Joe Lotz with the bank.

Mr. Garrison: If the Court please, I move that the present voluntary aspect of his answer be stricken out on the ground it is not responsive to the question as to the date when it was opened.

The Court: It may go out.

Mr. Bronson: It can go out as to that part.

Q. That account had stood in that amount or the approximate [721] amount you mentioned for several months before the date of the letter I'm handing you?

A. Yes, sir.

Q. Can you identify that as a letter with which

(Testimony of Mark Hart.)

you are familiar sent to Joe Lotz on the date I mentioned? A. Yes, sir.

Mr. Bronson: I ask that that be marked, please.

The Court: It may be admitted and marked.

(The letter above referred to was thereupon received in evidence and marked Defendant's Exhibit I.)

Mr. Bronson: I will read this with your Honor's permission. It is a carbon copy of a letter sent to Joe Lotz, 315 Fourteenth Street, Oakland 12, California. August 2nd, 1951.

"Dear Mr. Lotz:

"The American Fidelity & Casualty Company recently opened an account in the Central Bank at Oakland, California. This account was set up to enable you to deposit your American Fidelity & Casualty premiums in this account when due rather than forward the check to New York. We believe that this will work out to our mutual advantage.

"Your check for the full amount of the month's premiums that become due should be deposited in this account on the fifteenth (15th) day of the month. [722] The name of the account is "The American Fidelity & Casualty Company." Enough deposit slips should be sent to the bank to enable them to mail one to the attention of the Insurance Company in Richmond, Virginia and, one to our office here in New York.

"I would appreciate it if you would acknowledge

(Testimony of Mark Hart.)

receipt of these instructions and your agreement to comply therewith.

“Yours very truly, Treasurer.”

The initials at the bottom of the page on the left are “HAW”.

Can you tell us who that is?

A. That is H. Arthur Will.

Q. He was the treasurer of your Company at that time? A. Yes, sir.

Q. Were those instructions, the instructions contained in that letter, ever altered by your Company?

A. No, sir.

Q. That account is to be distinguished from the trustee account referred to in the August 22nd agreement with Lotz and with Smead that they maintained in the same bank, is that true?

A. Yes, sir.

Q. Was there a reason why—this is preliminary to these telegrams or teletypes that were referred to—was [723] there a reason why you set up an arrangement August 2nd for the deposit of the premium money coming to the American Fidelity & Casualty Company from the Lotz Agency, as set forth in the letter of Mr. Will's that I read?

A. Yes, there was a reason.

Q. What was the reason?

A. In July, some date in July that I do not recall, a check tendered us by Mr. Lotz in the round sum of \$50,000 or the sum of \$50,000 approximately was returned by the bank because checks he had

(Testimony of Mark Hart.)

deposited against it had not cleared. We did not learn of that for, oh, five to seven days, because of the banking channels between California and New York is quite slow. So since we had this account at the American Fidelity & Casualty Company at the Central Bank, which had been a dormant account, we felt that if we had Mr. Lotz deposit his premium funds direct to our account in Oakland instead of sending them to New York, it would save on the transmission time and the banking channel time entailed, and that in the event such a situation again arose, we would know immediately, so it was put in as a substitute for sending the checks direct to New York.

Q. I am not going to discuss all of these teletypes but only some of them. Now, the first one that I want to pick out is one dated August 30th appearing on page 6, as you have [724] numbered them, Mr. Garrison. I will follow your numbers when I refer to the page and I will read it. It was from you to Oakland:

“Have you received deposit slip covering commission checks in the amount of \$4,304.30 from Central Bank” dated 8/25/51.

“Answer: Yes, we have. Will advise you of deposits tomorrow. Ralph Smead.

“Minute. What about \$30,000 deposited 8/29”? Beneath, apparently under the same date, because there is no new date indicated, “How about funds of \$1,450 which you received last Friday? Also has

(Testimony of Mark Hart.)

check of \$30,000 actually been deposited at bank A.F.C. account. Go ahead.

“Answer: To both questions. (This presumably from the Oakland end.) Checks are all payable to Mid-States Insurance Company but waiting authorization required to deposit. We are advised by that Company that authorization has been forwarded to us. That is the only holdup. But has been definitely cleared after your telephone conversation yesterday with Smith. Everything is much better. Go ahead.”

Then apparently from your end:

“Understood Public Service checks were to be made payable to Lotz. Has this procedure been changed? [725] First check payable to Mid-States, however——”

This has been changed—I will read it as it is.

“First check payable to Mid-States. However, this has been changed, that if we do not receive authorization right away from them, we can have reissue day. Keep in touch. End.”

Will you state what you referred to in your question, “What about \$30,000”? The first time I read that figure, I read, “Has check of \$30,000 actually been deposited in bank,” as those two expressions appear in the portion read.

A. May I say immediately preceding that series of teletypes there was a telephone conversation. I do not know whether it emanated from Mr. Smead or myself, in which he told us that he had made a \$30,000 deposit. Having failed to receive either a deposit slip or a clearance from the Central Bank

(Testimony of Mark Hart.)

on it, I then teletyped him and asked him what about the deposit of \$30,000.

Q. Did you know where the \$30,000 was coming from?

A. He was supposed to be in the process of collecting on behalf of Mid-States the premiums applicable to the Public Service business.

Q. How much was the gross premium, as you understood it, out of this Public Service rewrite?

A. They told us it was \$150,000.

Q. What did 15 percent, their prepaid commission on that [726] business, amount to?

A. That would be \$22,500.

Q. That would be the larger portion of the \$30,000 which Mr. Smead referred to in a telephone conversation?

A. That is correct.

Q. Was the telephone conversation which you say you do not know who instituted, but that Smead mentioned \$30,000, was that the first time you had heard of \$30,000?

A. Yes.

Q. How long before the date of this first one I read, August 30th, did that telephone conversation take place?

A. I can't be sure, Mr. Bronson. It might have been two or three days.

Q. Was he receiving in the normal course of his business commissions, earned commissions on business from all of the companies for whom he was working during this period? I will put it this way, to make what I am getting at plain: Did you understand that the Mid-States business was the only

(Testimony of Mark Hart.)

source of revenue that the man had? A. No.

Q. Turning, if you will, Mr. Hart, to page 7, I omitted the wires or the teletypes there. Those are dated, the last date being 8/30, August 30th—this is dated August 31st to Mr. Ralph Smead—"Has check for \$30,000 been deposited in A.F.C. account as yet? Mr. Smead and [727] Mr. Lotz are in Los Angeles today (that is an answer) but they will call today. Will give them the message."

"Can you get in touch with them before 2:30 our time? Urgently know by then.

Answer: We should be in touch with them before that time. Will try. Okay. End."

That referred to the same matter, with the same explanation as to your meeting with those teletypes emanating from you? A. I believe they do.

Mr. Bronson: Page 8, Mr. Garrison. This is under date of September 6th, 1951. Thursday morning, 11:30 a.m., Joe Lotz, operator. Joe Lotz, Oakland, American Plan operator:

"Will appreciate your phoning address of Public Reinsurance Company. Will wait. Excuse. Should be Public Service Insurance Company. End." The same date, Joe Lotz, operator.

"The address is 10 Drumm Street, San Francisco. Amount of morning deposit to American Fidelity & Casualty account \$1,718. Mr. Smead is in San Francisco now working on Public Service account. End."

What was the purpose of your inquiry by this

(Testimony of Mark Hart.)

teletype of Oakland as to the address of the Public Service Insurance Company? [728]

A. Well, at this time or by this time I was beginning to suspect that perhaps Mr. Lotz' offices did not have a deal to rewrite the Public Service business in Mid-States, and since I was vitally interested in getting his commission in to help liquidate his balance to us, I had a thought in mind that we might clear with Public Service. However, we never did.

Q. You did not contact Public Service directly?

A. I don't believe we did, no, sir.

Mr. Bronson: Page 9, Mr. Garrison, dropping down to about a half-page:

"Tomorrow is deadline with \$190,000 unpaid."

And then apparently from the other end, "Be home after four o'clock your time."

Then from your end:

"Will contact you there later. End."

What does that \$190,000 unpaid refer to as the deadline?

A. May I have that date again, please?

Mr. Bronson: May we ask for that?

Mr. Garrison: September 14th.

Mr. Bronson: Where do you find that?

Mr. Garrison: At the top of the initiating message, American Plan, N.Y., 9/14.

Mr. Bronson: Oh, yes, September 14th is the date.

A. The agreement we made with Mr. Lotz under date of [729] August 22nd stipulated that all balances would be liquidated by September 15th. As a

(Testimony of Mark Hart.)

matter of fact, he wanted to make it the first of September, but we said no, the 15th, and this was the 14th. And I was just telling him that although tomorrow was the last day, he still owed us \$190,000, so he had only paid into us, either by cash payments or by commission credits, \$50,000 up to that point, 50 and 190 being the 240.

Q. You referred to the \$190,000 as the balance then due on the \$240,000 account as it stood when they came back to New York?

A. Yes, sir.

Q. By the way, I am going to digress a minute in respect to that September 15th closing, which is referred to in the agreement that you made with Joe Lotz when you were out here and when you cancelled the agency contract, the part of it that says he has to pay off all balances to the American Fidelity & Casualty on or before the 15th day of September. That would be a matter of about 25 days or something like that after the time the agreement was made. Did you expect to get paid out by September 15th?

A. No, sir, I did not. That was psychological. As a matter of fact, had we been paid by September 15th, he would have been pre-paying his August balance, which was not due until November 15th, and his July balance, which [730] was not due until October 15th.

Q. I am reading from the last message on the page:

“Is Mark Hart in, please?

(Testimony of Mark Hart.)

"Yes, go ahead.

"Mark, you mentioned the other day that you were short a couple of deposit slips. Which ones? Go ahead."

Your answer:

"One for \$15,000, one for \$7,867 and, of course, today's. I suppose you received the one for Saturday. Go ahead.

"Is this the one for \$60,000? Go ahead.

"Right. Okay. Received. Go ahead. Guess that will do it. Will send others out right away."

What is the explanation of that exchange of messages?

A. May I ask you, Mr. Bronson, where it refers to \$60,000, is that me talking to Mr. Smead or vice versa?

Q. If I can come up here, with his Honor's permission, the date is 9/17. That is September 17th. It follows by three days the \$190,000 wire that he sent you. Then it says, "Is Mark Hart in." That is apparently coming from you in New York. And then the answer, "Go ahead." Then this says, apparently, whoever was sending the wire here, "Mark, you mentioned the other day that you were short a couple of deposit slips. Which ones? Go ahead." [731]

And then the answer from Oakland, "One for \$15,000——"

A. This is our answer.

Q. Whose answer?

A. "One for \$15,000" is our answer, Oakland.

Q.. You are telling him the ones that are short?

(Testimony of Mark Hart.)

A. Yes.

Q. "And, of course, today's. I suppose you received the one for Saturday." Who does that come from? Is that from you or from Oakland?

A. That is from Oakland, I presume.

Q. And then it says, "Go ahead." The next is, "Is this the one for \$60,000? Go ahead." "Right." That is the answer from Oakland?

A. Yes, I directed that question to Mr. Smead about the \$60,000.

Q. What explanation have you?

A. On September 17th he was still in process of collecting our premiums. I presume from that—I can only presume—that there was a previous telephone conversation.

Mr. Garrison: I move that the presumption go out, if your Honor please, on the ground that it is simply a self-serving statement.

Mr. Bronson: You can't guess about it. Counsel is right.

Q. I will direct your attention to page 11, Mr. Garrison, [732] the top of the page, September 21, 1951, Friday morning. Whoever typed this up said approximately 11:45 a.m.

"Joe Lotz, operator, Oakland, California, American Plan Operator, Mark Hart to Ralph Smead. Sorry for error in my figures. Actual balance to date \$105,969. American Plan Loan of \$50,000 reduced to \$39,003 by application of July and August commissions. Balance therefore \$66,955, but we

(Testimony of Mark Hart.)

would also like you to clear up amount due this organization of \$39,003."

"What is your specific reply to my urgent request for liquidation for Company's auditors arrive, and preferably within the next five days. End. Joe Lotz, operator."

"Mr. Smead and Mr. Lotz are now out to lunch. Will return in approximately one hour. Will advise you then."

Can you explain to the Court, please, the reference to the sums there and the significance of them in connection with the reduction of your balance at the date of that teletype on September 21?

A. Well, it appears that inclusive of the loan of \$39,000, which we advanced to pay the American Fidelity and Casualty, that there remains a balance of \$105,000 which seems to indicate that up to that point we have been either paid or we have credited Mr. Lotz' account with some \$135,000. [733]

Q. Does that indicate to you any circumstance or fact in connection with the contention that there was any invasion of the funds of Mid-States or any other company in the liquidation program up to that point?

A. No, that does not indicate that to me at all.

Q. I beg your pardon?

A. That does not indicate that to me at all.

Q. And the balance therefore on the date of the wire was \$66,955?

A. Well, that is considering our loan of \$39,000.

(Testimony of Mark Hart.)

Q. Exclusive of that? A. Yes, sir.

Q. With reference to the next teletype on the same page, Joe Lotz, operator, to Mark Hart, from Joe Lotz and Ralph Smead, "In reply to your teletype of this morning, will have approximate deposit Monday of \$30,000. We are going on loan for any balance. Will telephone you Monday morning. End or go ahead."

"Reply: Okay, will expect your call Monday."

What comment do you have with regard to "A loan for balance including your funds advanced by us" in the scheme of the discharge of your indebtedness?

A. The only inference I can draw from that is he is still collecting our premiums.

Q. What about loans? [734]

A. Well, he has said, and subsequently after that date, said on many occasions that the loan was in process, or the loan was approved, et cetera.

Q. Page 14, two-thirds down the page. "To Mark Hart from Ralph Smead, October 17th, 1951, Anglo Bank has approved the loan. Was in their head office in San Francisco most of yesterday. All that is necessary to do is to confer assignment. Mr. Hal Smith of that Bank will contact you immediately. Will have additional money for you also. End." American Plan Operator. End."

What put that on the date of October 17th and their use of borrowed money, bank money, to assist in the liquidation?

A. The only comment I have on that is we evi-

(Testimony of Mark Hart.)

dently were tickled to death that the loan had been approved.

Q. That did not involve the invasion of anybody else's premium funds if they got a loan?

A. No, sir.

Q. The next page, October 18th: "We are arranging loan of \$50,000 which leaves balance of approximately \$25,000, which balance will be paid within the next ten days at the longest. We are wondering if Mr. Hart has had any word from the Anglo Bank. Go ahead."

The answer says: "Mr. Hart is out of the office but he did tell us that you have been trying to arrange this loan for [735] two weeks. Do you have a definite commitment on loan. Go ahead.

"Yes, we do, and it is now only a matter of confirming the reserve figures with—I can't read the next word—we understand correspondence has already been addressed to the A/P office."

Still assuring you of a loan?

A. Yes.

Q. During all this time you were sending teletypes, telephone messages back and forth, as you said earlier today, daily or oftener, and insisting upon payment of your account, is that true?

A. Yes, sir, we were really pushing.

Q. Page 17, October 23rd. I will get to the point.

"Mark, we have definite arrangements for loan and will also have some additional money for you. Don't see any necessity for trip by auditors. Don't think their trip would bring any faster results. I

(Testimony of Mark Hart.)

feel confident the matter will be completely cleared up in a very short time. Believe me we are using all of our efforts on this problem and so I would not advise a trip by your auditors."

Answer by you:

"Have complete confidence you and Joe, but entire situation will pass from my control to Company auditor [736] unless substantial deposit apart from loan is made by Friday. If you can send us a good size deposit by Friday, I may be able to talk auditor out of going to Oakland and stirring up all kinds of trouble. This matter has reached the stage where Company might take drastic action and of course I am doing everything within my power to avoid same for Joe's sake. End. D.C.M. We appreciate your part, Mark, and believe me we will do our best. End. Quoting from my calculations you should be collecting about \$100,000 this month."

A. Yes, sir, it was.

Q. That is a part of your pressure and insistence upon payment daily? A. That is correct.

Q. Page 18, the next day, August 24th:

"Mr. Ralph Smead from Mr. Will. Balance to date \$66,010.07. End. Does that figure include September commission and return premiums. Go ahead.

"This message is sent by bookkeeper. I have taken the balance from our books. Mr. Will is out of office at present so cannot verify whether this included above items. Will call you as soon as I do know. Go ahead."

"Good. Will appreciate it. End."

(Testimony of Mark Hart.)

What is the significance of that exchange of messages. [737] Are you referring to the \$66,000?

A. Well, that simply is the balance that was left as of October 24th.

Q. And again does this figure include September commissions and return premiums — that is September commissions?

A. Presumably the 20 per cent guaranteed commissions for September on our business.

Q. Returned premiums refers to——

A. Credits due him.

Q. Reference has been made to the fact that you engaged in employment out here sometime before or after the first of the years, 1952 Ralph Smead in some capacity. Did you engage him?

A. Yes, sir.

Q. In what capacity?

A. I think we called him service manager with regard to the handling of the runoff of Lotz' business.

Q. At that time was he engaged at all for the purpose of producing business?

A. No, sir.

Q. For adjustments?

A. To some extent in supervision of adjustments, yes, sir, but it had to do with the runoff of business.

Q. It was still in effect up to and ending with the cancellation of the Lotz Agency by American Fidelity & Casualty? [738]

A. Yes, sir.

Q. Under what circumstances did you put Smead in there on that work?

(Testimony of Mark Hart.)

A. I came to Oakland, I believe, in January 1952, and I found that we were faced with an extremely difficult situation arising from the fact that Mid-States Insurance Company——

Mr. Garrison: If the Court please, it appears that we are getting into another one of these volunteer statements by Mr. Hart. It seems to me he should confine his testimony to conversations or statements of fact.

Mr. Bronson: I do not think so, your Honor. I have never heard of such a rule of law. I asked him the circumstances under which he engaged him. He cannot answer that by saying conversations. He has to recall the circumstances.

Mr. Garrison: He is not giving the circumstances. He is reaching into an explanation of what was in his mind and what the conditions were that are entirely self-serving.

Mr. Bronson: When a man gives a reason, he has to give it from his mind.

The Court: Read the question and answer.

(Record read.)

The Court: You may continue. The objection will be overruled.

The Witness: Mid-States Insurance Company had taken [739] over the office of Mr. Lotz——

Mr. Garrison: I move that be stricken on the ground that it calls for a conclusion whether or not they had taken over the office of Mr. Lotz.

Mr. Bronson: We already have the fact, every book and record in their possession.

(Testimony of Mark Hart.)

Mr. Garrison: It involves a legal interpretation by this Court.

The Court: Doesn't the record already disclose who took it over?

Mr. Garrison: We leased some space and we leased his equipment.

The Court: That is what he has in mind.

Mr. Bronson: You are not half telling the story. They took every record he had.

Mr. Garrison: In the sense of taking over, that is a legal maneuver, and of course, that would be a matter for the Court to pass upon.

The Court: I am sure you will cross-examine him on every detail. Proceed.

The Witness: Among the records of the Mid-States acquired from Lotz were voluminous batches of cancelled American Fidelity and Casualty policies, reports of losses, et cetera, and we were receiving numerous complaints about the non-payment of return premiums and the payment of losses, [740] but we felt that our hands were tied because we did not have these documents. Of course, when we requested Mid-States to give them to us they did, but by this time they had accumulated to such an extent that we had to put someone in here in the interest of serving the public to process these return premiums and losses, and Ralph Smead was the only logical man to turn to. I asked if he would work for us in disposing of these and any subsequent ones that arose.

Q. About how long was he engaged in the work

(Testimony of Mark Hart.)

of running off. if I can use the term. the services that you engaged him for?

A. I am not very certain of that. Mr. Bronson. The work did taper off gradually. but it seems to me sometime in the spring of 1953 it had practically eliminated itself.

Q. Did you at any time after January, 1952. enlarge his duties? A. Yes, sir.

Q. If so, when was it and what did it consist of?

A. It seems to me that sometime in possibly June or July 1953. the work in connection with the liquidation of the Joseph Lotz agency, insofar as servicing the public was concerned, had been practically eliminated. Ralph Smead called me and he said that he had an opportunity to go somewhere else for a job because this thing was practically washed up. but he said he would like an opportunity to produce [741] business for us. I decided to give him a chance to do so. and I asked him to come to New York to discuss it. We then made an arrangement appointing him Pacific Coast Manager and his duties then were strictly production, servicing, and supervision of our business primarily in the State of California.

Q. How long did that job last?

A. I think that we terminated that position in September or October, 1953.

Q. Who terminated it. he or you?

A. We did.

Q. Did you ever in the course of any of this period. following the statements he had signed to the

(Testimony of Mark Hart.)

Mid-States people when they were out here early in December, 1951, and at any time during his employment with you, ever ask him to repudiate those statements?

A. No, sir, I never endeavored to influence him.

Q. My question was did you ever ask him to repudiate them or change them in any respect?

A. No, sir, I did not.

Q. Did you ever tell him he would have to try to forget what he said in those statements?

A. No, sir.

Q. Please do not think I am trying to indicate more than the idea. Did you ever tell him at or before or during the [742] time that our office, my office, was engaged in respect of these matters under suit, that he was not to tell Mr. McKinnon any of the real facts of the case because Mr. McKinnon would then not want to represent American Plan or American Fidelity & Casualty?

A. I did not.

Q. Was any subject of that kind ever discussed or intimated between you and Mr. Smead?

A. No, sir.

Q. I will ask you by way of conclusion of this direct examination, Mr. Hart, whether with Mr. Lotz or Mr. Smead, from the beginning of the time that your Company engaged Mr. Lotz as agent, ever enter into any conspiracy with Lotz and Smead through you or through anybody else in your organization to invade premium funds of other compa-

(Testimony of Mark Hart.)

nies other than your companies for the payment of your account? A. I did not.

Q. Did you ever, or did anyone in your Company ever suggest, to your knowledge, a concealment to Lotz or to Smead of any fact of the Mid-States Company concerning your business with Lotz' Agency? A. No, sir.

Mr. Bronson: There may be some things I have forgotten, Judge. It is a long direct examination but I will conclude it now. I do not know whether the hour has any bearing. [743]

The Court: Maybe counsel wants to go on.

Mr. Garrison: If I did, I would be very unpopular, but I do not.

The Court: Very well. We will adjourn until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken until 10:00 o'clock a.m., Wednesday, May 12, 1954.)

The Clerk: Mid-States Insurance Company versus Anglo California National Bank and American Fidelity and Casualty Company, further trial.

Mr. Bronson: Ready. Will you step forward, Mr. Hart?

The Clerk: Mark M. Hart to the stand, heretofore sworn.